DOCKET

No. 08-681
Title: Jean Marc Nken, Petitioner
v.
Eric H. Holder, Jr., Attorney General
Docketed: November 25, 2008
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (08-1813)
Decision Date: November 5, 2008
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Nov 7 2008	Application (08A413) for stay pending appeal, submitted to The Chief Justice.
Nov 10 2008	Response to application (08A413) requested by The Chief Justice, due November 17, 2008, by 4 p.m.
Nov 17 2008	Response to application from respondent Michael B. Mukasey filed.
Nov 18 2008	Reply of applicant Jean Marc Nken filed.
Nov 24 2008	DISTRIBUTED for Conference of November 25, 2008.
Nov 24 2008	Application (08A413) referred to the Court by The Chief Justice.
Nov 25 2008	Petition for a writ of certiorari filed.
Nov 25 2008	The application for stay presented to The Chief Justice and referred to the Court is granted, and it is ordered that the removal of petitioner is hereby stayed pending further order of the Court. In addition, the application for stay is treated as a petition for a writ of certiorari, and the petition for a writ of certiorari is granted limited to the following question: "Whether the decision of a court of appeals to stay an alien's removal pending consideration of the alien's petition for review is governed by the standard set forth in section 242(f)(2) of the Immigration and Nationality Act, 8 U.S.C. Sec. 1252(f)(2), or instead by the traditional test for stays and preliminary injunctive relief." The brief of the petitioner is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m. Friday, December 19, 2008. The brief of the respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m. Wednesday, January 7, 2009. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m. Wednesday, January 14, 2009.
Nov 26 2008	SET FOR ARGUMENT ON Wednesday, January 21, 2009.
Dec 5 2008	Record received from the U.S.C.A. for the 4th Circuit. (1 envelope and 1 CD)
Dec 19 2008	Joint appendix filed. Statement of costs received.
Dec 19 2008	Brief of petitioner Jean Marc Nken filed.
Dec 23 2008	Brief amici curiae of American Immigration Lawyers Association, et al. filed.
Dec 29 2008	Brief amici curiae of Law Professors filed.
Dec 31 2008	CIRCULATED.
Jan 7 2009	Brief of respondent Michael B. Mukasey, Attorney General filed. (Distributed)
Jan 8 2009	Brief amicus curiae of Washington Legal Foundation filed. (Distributed)
Jan 14 2009	Reply of petitioner Jean Marc Nken filed. (Distributed)
Jan 21 2009	Argued. For petitioner: Lindsay C. Harrison, Washington, D.C. For respondent: Edwin S. Kneedler, Acting Solicitor General, Department of Justice, Washington, D.C.

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PETITION FOR WRIT OF CERTIORARI

No. ____________

IN THE

Supreme Court of the United States

JEAN MARC NKEN,

Applicant/Petitioner,

v.

MICHAEL MUKASEY, UNITED STATES ATTORNEY GENERAL,

Respondent.

EMERGENCY MOTION FOR A STAY OF REMOVAL PENDING ADJUDICATION OF THE PETITION FOR REVIEW IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, OR IN THE ALTERNATIVE, PETITION FOR A WRIT FOR CERTIORARI AND A STAY OF REMOVAL PENDING RESOLUTION OF THE PETITION

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

Applicant Jean Marc Nken ("Mr. Nken" or "Applicant") respectfully requests an order staying his removal pending adjudication of his Petition for Review by the United States Court of Appeals for the Fourth Circuit. In the alternative, Mr. Nken requests that the Court treat this motion as a petition for a writ of certiorari, grant the petition, and grant Mr. Nken a stay of removal during the Court's consideration of the petition.

Mr. Nken is currently in the custody of the Department of Homeland Security and may be deported at any time. He sought and was denied a stay of removal from the Fourth Circuit.

Several days before denying the stay, the Fourth Circuit held, over the dissent of four judges from the denial of rehearing en banc, that 8 U.S.C. § 1252(f)(2) bars a court order staying the removal of an alien "'unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.'" *Teshome-Gebreegziabher v. Mukasey*, 528 F.3d 330 (4th Cir. 2008), *rehearing en banc denied*, __ F.3d __, 2008 WL 4741721, at *1 (Oct. 30, 2008) (quoting 8 U.S.C. § 1252(f)(2)). The Fourth Circuit's interpretation, while consistent with that of the Eleventh Circuit, conflicts with that of eight other circuits, all of which have held that the heightened standard of § 1252(f)(2) applies only to injunctions against an alien's removal, but not to temporary stays sought for the duration of the alien's petition for review. In those eight circuits, the courts of appeals use their traditional standard for granting injunctive relief in the immigration context, which measures an applicant's likelihood of success on the merits and takes into account the equity interests involved.

Justice Kennedy previously recognized the circuit split and stated that the "issue is important." *Kenyeres v. Ashcroft*, 538 U.S. 1301 (2003) (Kennedy, J., in chambers). He concluded that "[g]iven the significant nature of the issue and the acknowledged disagreement among the lower courts, the Court, in my view, should examine and resolve the question in an appropriate case." *Id.* at 1305 (Kennedy, J., in chambers).

This is an appropriate case to review the issue. Under the traditional standard adopted by eight of the circuits, Mr. Nken's request for a stay of deportation would likely have been granted: the merits of Mr. Nken's petition for review are strong because the Board of Immigration Appeals ("BIA") ignored or misconstrued the most material evidence submitted in support of his motion to reopen, and the equities demand a stay because Mr. Nken may face arrest, torture, and death upon his removal to Cameroon and, if removed, will leave behind his U.S. citizen wife and U.S. citizen young son.

Because the Fourth Circuit has adopted an incorrect interpretation of § 1252(f)(2) in denying Mr. Nken's motion for a stay and because Mr. Nken was entitled to a stay under the correct standard applicable in eight other courts of appeals, Mr. Nken respectfully requests that the Court grant Mr. Nken's emergency motion for a stay of removal pending adjudication of his petition for review in the Court of Appeals for the Fourth Circuit.

In the alternative, Mr. Nken respectfully requests that the Court treat this stay application as a petition for certiorari, grant the petition to determine the proper standard for adjudicating motions to stay removal pending resolution of an alien's petition for review, and grant Mr. Nken a stay of removal during the Court's consideration of the petition for certiorari. *See Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) (treating application to stay injunction pending appeal as petition for certiorari, granting certiorari, and vacating injunction); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) (treating application for stay of execution as a petition for writ of certiorari); *see generally* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 418-19 (2007).

ORDER AND OPINION BELOW

The order of the United States Court of Appeals for the Fourth Circuit denying Mr. Nken's Motion to Stay Deportation Pending Review is Order. *Nken v. Mukasey*, Case No. 08-1813 (4th Cir. Nov. 5, 2008). That Order is an unpublished opinion. *See* Exhibit 1.

STATEMENT OF THE CASE

Mr. Nken is confined in DHS custody and may be removed at any time pursuant to a final order of removal by the BIA denying his motion to reopen his application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT") based on changed country conditions.

Mr. Nken is a native and citizen of Cameroon who fled due to persecution based on his democratic opposition to the oppressive Biya regime. Mr. Nken entered the United States legally and has been law-abiding since he arrived in 2001. Removal proceedings were initiated because he overstayed his visa. Mr. Nken then applied for asylum, withholding of removal, and CAT relief. His application alleged that Mr. Nken had participated in pro-democratic activities in Cameroon which made him an enemy of the Biya administration. He alleged that he had twice been arrested for these activities and had been detained for approximately one month and frequently beaten and interrogated about them. Mr. Nken's application for asylum, withholding of removal, and CAT relief was denied in 2003.

Over the period during which these proceedings were taking place, Nken met Brigitte Beloeck, a then-permanent resident and now U.S. citizen. Nken and Beloeck married on November 4, 2004 and subsequently had a child together who is a U.S. citizen.

On May 7, 2008, Nken filed a motion to reopen his petition for asylum, withholding of removal, and CAT relief based on changed country conditions in his native country of

Cameroon. *See* Exhibit 2. Nken submitted numerous pieces of evidence demonstrating dramatic changes in the Cameroonian political landscape in the wake of President Biya's announcement that he would amend the Cameroonian constitution to allow him to be a dictator for life. Foremost among these was a detailed letter from Nken's younger brother, Lucien Nounga, in which Nounga, who still resides in Cameroon, told his brother that the Biya regime was arresting political opponents, including Nounga himself, that the government was looking over lists of students from the 1990s who were demonstrating against the government, and that Nken's name was on those lists. The letter warned Nken that "it is really dangerous for you being one of those with problems from the past" and that Nken's "life will be in a real danger" if he returned to Cameroon.

On June 23, 2008, a single judge of the BIA issued an order less than two pages long which denied Nken's motion. *See* Exhibit 3.

On July 23, 2008, Mr. Nken filed a petition for review in the Fourth Circuit Court of Appeals. *See* Exhibit 4.

On August 6, 2008, Mr. Nken filed a motion to stay deportation pending resolution of his petition for review. *See* Exhibit 5. Mr. Nken contended that he was entitled to a stay of removal under the standard announced by the Fourth Circuit in *Teshome-Gebreegziabher*, 528 F.3d 330 (4th Cir. 2008), which held that § 1252(f)(2) bars an order staying removal pending resolution of a petition for review unless an alien meets a very strict burden of proof. Mr. Nken also argued that the standard adopted by the Fourth Circuit in *Teshome-Gebreegziabher* was incorrect and that he was entitled to a stay of removal under the traditional standard for granting injunctive relief.

Mr. Nken asserted that the BIA abused its discretion in denying his motion to reopen. Mr. Nken argued that the BIA abused its discretion by ignoring or misconstruing material evidence, in particular the letter from Mr. Nken's brother. The BIA stated that the evidence demonstrated general civil unrest rather than persecution specific to Mr. Nken. But the BIA ignored the arrest of Mr. Nken's brother, the brother's warning to Mr. Nken that Mr. Nken would be especially subject to arrest because his name appeared on the lists being targeted by the Biya regime, and the brother's statement that Mr. Nken's life would be endangered should he return to Cameroon because of the current persecution of dissidents and his and his family's political opposition activities. By ignoring this evidence, Mr. Nken argued, the BIA abused its discretion.

Mr. Nken also argued that the BIA erred in denying Mr. Nken's motion based on the fact that he did not submit a personal statement in support of his motion to reopen based on changed country conditions. Mr. Nken argued that this was an abuse of discretion because no statute or regulation and no BIA precedents require the submission of such a statement, particularly when corroborating evidence demonstrates a prima facie persecution claim. Whether a petitioner must submit such a statement in support of a motion to reopen based on changed country conditions is a question of first impression in the Fourth Circuit.

On August 13, 2006, the Attorney General filed a response opposing the stay and arguing that the proper standard for determining whether a stay is warranted is the one articulated in 8 U.S.C. § 1252(f)(2). *See* Exhibit 6. The Government made no claim that Mr. Nken failed to meet the traditional standard for a stay which is applied in eight other circuits.

On October 30, 2008, the Fourth Circuit denied rehearing *en banc* in *Teshome-Gebreegziabher* and held that 8 U.S.C. § 1252(f)(2) shall apply to motions to stay removal pending resolution of an alien's petition for review. *See Teshome-Gebreegziabher v. Mukasey*, __ F.3d __, 2008 WL 4741721 (4th Cir. Oct. 30, 2008).

On November 5, 2008, the Fourth Circuit denied Mr. Nken's stay motion. *See* Exhibit 1.

Briefing on the merits of Mr. Nken's petition for review is incomplete at this time. Mr. Nken filed his opening brief on October 30, 2008. *See* Exhibit 7. The government's response is due on December 1, 2008.

Mr. Nken remains in DHS custody and may be deported at any time.

REASONS FOR GRANTING THE STAY OF REMOVAL OR ALTERNATIVE RELIEF

THE COURT SHOULD STAY MR. NKEN'S REMOVAL TO PERMIT ORDERLY RESOLUTION OF MR. NKEN'S PETITION FOR REVIEW AND TO RESOLVE THE CIRCUIT SPLIT CONCERNING THE PROPER INTERPRETATION OF § 1252(f)(2).

Mr. Nken seeks a stay of removal pending the Fourth Circuit's resolution of his petition for review. The standard under which the Fourth Circuit denied Mr. Nken's motion to stay is the subject of a circuit split concerning the proper interpretation of 8 U.S.C. § 1252(f)(2). That section provides that "no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." The Fourth Circuit and Eleventh Circuit have interpreted this provision to apply to motions for a temporary stay of removal pending judicial review and thus apply a "clear and convincing evidence" standard to such motions. *See Teshome-Gebreegziabher v. Mukasey*, 528 F.3d 330 (4th Cir. 2008), *reh'g denied*, __ F.3d __ (4th Cir. Oct. 30, 2008) (en banc); *Weng v. Attorney General*, 287 F.3d 1335 (11th Cir. 2002) (per curiam).

Eight other circuits have interpreted this provision as inapplicable to such motions. These circuits evaluate requests for a stay under their traditional standard for granting injunctive relief in the immigration context, which measures an applicant's likelihood of success on the merits and takes account of the equity interests involved. *See Tesfamichael v. Gonzales*, 411 F.3d 169 (5th Cir. 2005); *Hor v. Gonzales*, 400 F.3d 482 (7th Cir. 2005); *Douglas v. Ashcroft*, 374 F.3d 230 (3d Cir. 2004); *Lim v. Ashcroft*, 375 F.3d 1011 (10th Cir. 2004); *Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003); *Mohammed v. Reno*, 309 F.3d 95 (2d Cir. 2002); *Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001); *Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001) (en banc); *see also Bonhomme-Ardouin v. United States Attorney General*, 291 F.3d 1289, 1290 (11th Cir. 2002) (Barkett, J., concurring) (expressing disagreement with the Eleventh Circuit's interpretation of 8 U.S.C. § 1252(f)(2) and urging reconsideration en banc).

The circuit split on this precise issue was noted by Justice Kennedy in 2003, before the Fourth Circuit adopted the minority view of § 1252(f)(2). *See Kenyeres v. Ashcroft*, 538 U.S. 1301 (2003) (Kennedy, J., in chambers). In *Kenyeres*, Justice Kennedy explained:

> The issue is important. If the exacting standard of § 1252(f)(2) applies to requests for temporary stays, then to obtain judicial review aliens subject to removal must do more than show a likelihood of success on the merits. *See Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L.Ed.2d 323 (1979) (The "intermediate standard of clear and convincing evidence" lies "between a preponderance of the evidence and proof beyond a reasonable doubt"). An opportunity to present one's meritorious grievances to a court supports the legitimacy and public acceptance of a statutory regime. It is particularly so in the immigration context, where seekers of asylum and refugees from persecution expect to be treated in accordance with the rule-of-law principles often absent in the countries they have escaped. A standard that is excessively stringent may impede access to the courts in meritorious cases. On the other hand, § 1252(f)(2) is a part of Congress' deliberate effort to reform the immigration law in order to relieve the courts from the need to consider meritless petitions, and so devote their scarce judicial resources to meritorious claims for relief. *Cf. Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486, 119 S. Ct. 936, 142 L.Ed.2d 940 (1999). If the interpretation adopted by the Second, Sixth, and Ninth Circuits is

> erroneous, and § 1252(f)(2) governs requests for stays, this congressional effort will be frustrated.

Id. at 1305 (Kennedy, J., in chambers).

The issue presented by this circuit split presents an important question of federal law. The number of petitions for review from immigration decisions has increased substantially in recent years to between 1,000 and 1,200 per month. *See* Executive Office for Immigration Review, Fact Sheet: BIA Streamlining 2 (Sept. 15, 2004), http://www.usdoj.gov/eoir/press/04/BIAStreamlining2004.pdf (hereinafter "EOIR Fact Sheet"); *see also* Admin. Office of the U.S. Courts, Judicial Business of the United States Courts 2006, tbl.B-3 (Mar. 31, 2007), available at http://www.uscourts.gov/judbus2006/appendices/b3.pdf. Nearly every alien filing a petition for review of a final order of removal seeks a stay of removal pending judicial review of his or her claims. EOIR Fact Sheet at 2. Thus the issue presented in Mr. Nken's case is one that arises thousands of times each month in the federal courts. The standard applied to these motions—and thus the likelihood that a petitioner will obtain a stay of removal—differs not based on the strength of the petitioner's claims, but rather on how the petitioner's circuit interprets a federal statute. Judge Michael observed in dissent from the Fourth Circuit's denial of rehearing en banc that the Fourth Circuit's interpretation of § 1252(f)(2) "will lead to nonuniform application of the immigration laws and to unjust results in our circuit . . . ." *Teshome-Gebreegziabher*, 2008 WL 4741721 at *4 (Michael, J., dissenting from the denial of rehearing en banc). For these reasons, in *Kenyeres*, Justice Kennedy stated that "[g]iven the significant nature of the issue and the acknowledged disagreement among the lower courts, the Court, in my view, should examine and resolve the question in an appropriate case." *Kenyeres*, 538 U.S. at 1305 (Kennedy, J., in chambers).

The *Kenyeres* case was not an appropriate vehicle for resolution of this circuit split because Justice Kennedy concluded that the petitioner was unlikely to prevail in his request for a stay under either standard. *Id.* at 1306 (Kennedy, J., in chambers).

In this case, by contrast, the issue is squarely presented. Mr. Nken would have obtained a stay of removal under the preliminary injunction standard applied in eight circuits, which requires only a reasonable likelihood of success on the merits, or a likelihood of prevailing on appeal that is "better than negligible." *Sofinet v. INS*, 188 F.3d 703, 707 (7th Cir. 1999); *Mohammed v. Reno*, 309 F.3d 95, 102 (2d Cir. 2002) (stating that the "likelihood of success on appeal need not be set too high" for asylum applicants to secure a stay of removal).

Under these standards, Mr. Nken has at least a reasonable likelihood of success on the merits given that his case is closely analogous to others where petitioners have succeeded on appeal. *See* Exhibit 5 at 10-13; Exhibit 7 at 17-21. For instance, Mr. Nken argues in his Petition for Review that the BIA erred in ignoring material evidence of changed country conditions in Cameroon—namely, a detailed letter from Mr. Nken's younger brother, Lucien Nounga, in which Nounga, who still resides in Cameroon, told his brother: that the Biya regime was arresting political opponents, including Nounga himself; that the government was looking over lists of students from the 1990s who were demonstrating against the government, and that Nken's name was on those lists; that "it is really dangerous for you being one of those with problems from the past"; and that Nken's "life will be in a real danger" if he returned to Cameroon. The BIA did not find that Mr. Nounga's letter was not credible. Rather, the BIA simply failed to consider the substance of Mr. Nounga's letter and dismissed it in a single line which characterized the letter as describing "the civil unrest that 'started with the taxi-cab drivers' strike because of the high price of gas and which transformed this strike into a social movement.'" The BIA did not even mention the most material aspects of this letter—namely, the arrest of Nken's brother and the numerous statements in the letter describing the danger Nken would face were he now to return to Cameroon. The letter from Mr. Nounga thus belies any assertion that Mr. Nken's motion to reopen failed to link changes in Cameroon to his claim for relief. *See, e.g.*, Exhibit 6 at 9.

Under similar factual circumstances, the Courts of Appeals have found the BIA's decision to be arbitrary and capricious. *See, e.g.*, *Shing Jiang Lui v. BIA*, 237 F. App'x 647, 649 (2d Cir. 2007) (finding that the BIA abused its discretion when it "did not comment on" a letter submitted from petitioner's home country in support of changed country conditions); *Qing Ming Liu v. Mukasey*, 276 F. App'x 93, 94 (2d Cir. 2008) (holding that BIA abused its discretion where denied a motion to reopen based on changed country conditions but "failed to consider the complete record," including news articles submitted by petitioner); *Shardar v. Att'y Gen. of the U.S.*, 503 F.3d 308, 316-17 (3d Cir. 2007) (finding that the BIA abused its discretion by failing to consider and appraise the material evidence before it, including an "affidavit from his brother in Bangladesh that stated that he (the brother) had been recently threatened with a gun and beaten by 'BNP goons' for being a 'collaborator of Jatiya Party'"); *Diallo v. Gonzales*, 175 F. App'x 74, 75-76 (7th Cir. 2006) (holding that BIA abused its discretion because petitioner submitted documents that described "ominous developments" in native country but BIA merely "brushed off this evidence"); *Shou Yung Guo v. Gonzales*, 463 F.3d 109, 115 (2d Cir. 2006) (stating that "[i]t is not apparent to us that the BIA ever really paid any attention to the documents" and "IJs and the BIA have a duty to explicitly consider any country conditions evidence submitted by an applicant that materially bears on his claim" (quotation marks omitted)); *Reyes v. INS* 673 F.2d 1087, 1089 (9th Cir. 1982) ("When the Board distorts or disregards important aspects of the alien's claim, denial of the alien's motion to reopen is arbitrary and the Board has abused its discretion."). Given that Mr. Nken's case is factually analogous to these cases where the petitioner prevailed, he has demonstrated at least a reasonable likelihood of success on the merits of his petition for review.

Furthermore, the BIA erred in placing dispositive weight on the absence of "[Mr. Nken's] own statement or asylum application articulating his persecution claim." Exhibit 3 at 1. The BIA concluded that Nken's failure to submit his own statement was "significant in this case where the Immigration Judge's adverse credibility determination remains undisturbed." Exhibit 3 at 1. Yet neither the relevant statute nor the relevant regulations require the submission of such statements on a motion to reopen. In fact, "[t]he statute provides little guidance on the form or sufficiency of a motion to reopen; it simply directs that the motion 'shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.'" *Fessehaye v. Gonzales*, 414 F.3d 746, 753 (7th Cir. 2005) (quoting 8 U.S.C. § 1229a(c)(7)(B)). The regulations repeat this directive: "A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material." 8 C.F.R. § 1003.2(c)(1). Moreover, the BIA has never required a petitioner to submit a personal statement in support of a motion to reopen based on changed country conditions, and the BIA cited no cases in which it had even considered such statements, much less any case where it had regarded the absence of such a statement as "significant." By pulling from thin air the requirement that Nken submit his own personal statement on a motion to reopen, the BIA ignored the plain language of the statute and regulation and "inexplicably depart[ed] from established policies." *Cao v. U.S. Dep't of Justice*, 421 F.3d 149, 157 (2d Cir. 2005). In so doing, the BIA abused its discretion. *See Billeke-Tolosa v. Ashcroft*, 385 F.3d 708, 712 (6th Cir. 2004) ("[T]he BIA ha[s] no discretion to ignore its own precedent."); *Singh v. U.S. Dep't of Justice*, 461 F.3d 290, 295 (2d Cir. 2006) ("[A]n administrative agency must adhere to its own regulations."); *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996) ("An agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along.").

Finally, under the standard applied in the majority of circuits, the equities would demand a stay. First, the courts applying the traditional preliminary injunction standard have noted that the equities particularly favor the alien facing deportation in immigration cases where failure to grant the stay would result in deportation before the alien has been able to obtain judicial review. *See, e.g., Thapa v. Gonzalez*, 460 F.3d 323, 336 (2d Cir. 2006) ("[T]his Circuit has granted a stay pending appeal where the likelihood of success is not high but the balance of hardships favors the applicant." (quotation marks omitted)); *Mohammed*, 309 F.3d at 102 ("In the context of a stay of removal of an alien pending appeal of an adverse habeas decision, the gravity of the injury to the alien if a stay is denied, compared to the lesser 'injury' to the Government if one alien is permitted to remain while an appeal is decided, suggests that the degree of likelihood of success on appeal need not be set too high."); *Tesfamichael*, 411 F.3d at 178 (discussing the "extraordinary likelihood of irreparable harm the petitioners face if deported (in the form of forced separation and likely persecution), and the public interest in having the immigration laws applied correctly and evenhandedly").

Second, the equities in Mr. Nken's case are particularly strong. For four years, Mr. Nken has been married to a U.S. citizen with whom he has a young son who is also a U.S. citizen. Mr. Nken's motion to reopen alleged that he would face significant risk of arrest, torture, and death were he removed back to Cameroon, where he is considered an enemy of the Biya administration. The letter from Mr. Nken's brother, submitted in support of his motion, indicated that Mr. Nken's name appears on the lists of political opponents being reviewed by the Biya regime, that Biya is arresting those on the list, and that Mr. Nken's life will be in danger should he return to Cameroon. The BIA did not question the credibility of this letter in its decision denying Mr. Nken's motion to reopen. Given the absence of any injury to the public interest in comparison to the devastating consequences to Mr. Nken and his family if he were removed, the equities counsel strongly in favor of a stay of removal under the traditional standard for such stays. Accordingly, because Mr. Nken has a reasonable likelihood of success on the merits of his petition for review and because the equities favor a stay of removal, a stay of removal would be appropriate under the traditional standard for preliminary injunctive relief.

By contrast, under the Fourth Circuit's standard, Mr. Nken was virtually foreclosed from obtaining a stay of removal. The Fourth Circuit's interpretation of § 1252(f)(2) required Mr. Nken to demonstrate "by clear and convincing evidence" that a discretionary decision of the BIA was "prohibited as a matter of law." As Judge Easterbook has explained, "[a]s a practical matter, removal is 'prohibited by law' only when the person is a citizen of the United States or holds a visa of unquestioned validity. . . . [A]n alien . . . who contends only that the immigration judge's conclusion is unsupported by substantial evidence will be unable to demonstrate 'by clear and convincing evidence that the entry or execution of [the removal] order is prohibited as a matter of law' and thus would have no hope of a stay if § 1252(f)(2) applies to requests for stays." *Hor*, 400 F.3d at 483; *see also Tesfamichael*, 411 F.3d at 173 ("[A]s a practical matter, the adoption of the standard urged by the government would render stays of deportation almost impossible to obtain."). Judge Michael similarly explained in his dissent from the denial of rehearing en banc that the Fourth Circuit's standard "means that an alien presenting a meritorious issue of first impression or challenging a substantial evidence determination can *never* be granted a stay . . . ." *Teshome-Gebreegziabher*, 2008 WL 4741721, at *8 (Michael, J., dissenting from the denial of rehearing en banc).

Mr. Nken's case vividly illustrates the problem. While Mr. Nken can demonstrate that the BIA abused its discretion in ignoring material evidence, it is virtually impossible for him to show in a motion to stay, before the merits have been heard, that the BIA's order was clearly prohibited as a matter of law. Moreover, since the Fourth Circuit has never spoken to the requirement that a petitioner submit a personal statement to accompany a motion to reopen based on changed country conditions, it is impossible for Mr. Nken to demonstrate at the stay stage that the BIA's order so requiring was clearly prohibited as a matter of law.

Finally, making matters worse, the equities are utterly irrelevant under the Fourth Circuit's analysis. Thus, the inherent inequity in deporting an alien prior to any judicial review of the BIA decision and the specific equities present in Mr. Nken's stay were of no consequence, even though they would have counseled strongly in favor of a stay under the traditional analysis. In short, the Fourth Circuit's application of 8 U.S.C. § 1252(f)(2) in adjudicating Mr. Nken's stay was almost certainly outcome-determinative.

Moreover, the Fourth Circuit's application of 8 U.S.C. § 1252(f)(2) to Mr. Nken's motion to stay removal pending review was erroneous. The term "enjoin" in subsection (f)(2) was not meant to apply to motions to stay removal temporarily pending judicial review. The Supreme Court itself has distinguished between injunctions and stays in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), which held that the two remedies are distinct for purposes of interlocutory appeal. The eight circuits taking the majority view have also correctly noted that a stay and an injunction are distinct. The distinction is likewise made by

Federal Rule of Appellate Procedure 18 and in 28 U.S.C. § 2349, which govern the issuance of "stays" pending appellate review of federal agencies' decisions. The legal distinction reflects a functional one: "an injunction is relief obtained through independent litigation and directed at a particular party, not a tribunal," while "a stay is a mechanism intrinsic to judicial review." *Tesfamichael*, 411 F.3d at 173-74.

Moreover, the structure and language of § 1252 confirm that Congress intended to maintain this distinction between "stays" and "injunctions" when it enacted IIRIRA. *Teshome-Gebreegziabher*, 2008 WL 4741721, at *6 (Michael, J., dissenting from the denial of rehearing en banc). Congress explicitly chose to use the word "stay" in eliminating automatic stays pending appeal in 8 U.S.C. § 1252(b)(3)(B). Congress separately uses the terms "enjoin" and "injunction" 7 times in Title 8. *Hor*, 400 F.3d at 485. "[T]hese words are not treated as coterminous in any provision." *Id.* And in § 1252(f), the section relevant here, Congress referred only to injunctions with no mention of stays, titling the heading of § 1252(f) as a "[l]imit on injunctive relief." Nowhere in § 1252, nor anywhere else in IIRIRA, did Congress define "injunctive relief" or "injunctions" to include stays.

Judge Easterbrook, writing on this issue, stated that "treating a rule addressed to 'injunctions' as covering 'stays' would impoverish the language and make the legislative task more difficult." *Hor*, 400 F.3d at 484. "[T]reating a subsection that mentions injunctions but not stays as covering both would force Congress to add provisos each time it sought to regulate one but not the other. Once a legal community develops a stable nomenclature, it is best to apply it mechanically so that no one is taken unawares, and so that drafting can be uncluttered by provisos." *Id.* For these reasons, and because the Fourth Circuit's reading of § 1252(f)(2) would virtually eliminate the ability of most aliens to obtain stay of removal pending review of their claims—something not clearly intended from the language Congress chose to use—a majority of the circuits have rejected the interpretation of § 1252(f)(2) as applying to temporary stays of removal pending judicial review.

Had the Fourth Circuit applied the proper standard for such motions—the standard utilized by eight other courts of appeals under similar circumstances—Mr. Nken would have obtained a stay of removal pending resolution of his petition for review. Because the Fourth Circuit applied the incorrect standard and is entitled to a stay of removal pending resolution of his petition for review under the proper standard, the Court should grant his application for a stay. In the alternative, the Court should treat his application for a stay as a petition for certiorari, grant the petition for certiorari since Mr. Nken's claim is sufficiently meritorious to create a reasonable probability that four Members of the Court will vote to grant certiorari in this case, and grant Mr. Nken a stay of deportation pending full review.

CONCLUSION

This Court should grant a stay of removal pending resolution of the Applicant's petition for review or, in the alternative, the Court should treat this stay application as a petition for certiorari, grant the petition, and stay deportation pending full review.

Respectfully submitted,

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I hereby certify that true copies of the Emergency Motion For A Stay Of Removal Pending Adjudication Of The Petition For Review In The United States Court Of Appeals For The Fourth Circuit have been served by first-class mail upon those listed below, on this day, November 7, 2008.

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REPLY
BRIEF

117 ⑧ No. 08-681

Supreme Court, U.S.
FILED
JAN 14 2009
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

JEAN MARC NKEN,
Petitioner,
v.
MICHAEL MUKASEY,
UNITED STATES ATTORNEY GENERAL,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

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ARGUMENT

In order for Congress to restrict the traditional equitable powers of the courts to issue a stay pending appeal, it must do so clearly and explicitly. Nothing in IIRIRA contains the requisite clear statement. Although Congress made stays of removal orders discretionary rather than automatic in § 1252(b)(3)(B), it did not expressly alter the traditional standard for granting such stays. And when Congress enacted § 1252(f)(2), limiting the authority of courts to issue certain injunctions, it did not mention stays at all. Thus, IIRIRA leaves intact the federal courts' traditional power to grant a stay pending appeal.

Despite the absence of the word "stay" in § 1252(f)(2), the Government contends that section should be understood as radically redefining the traditional stay standard to require a heightened showing on the merits and to eliminate *all* consideration of the equities. None of the Government's arguments in support of that extraordinary reading has merit.

First, the Government asserts that this Court should accord no significance to Congress's choice to use the word "stay" in one section and the word "enjoin" in another, because, in its view, a stay is a type of injunction. That approach ignores the well-settled distinctions between stays and injunctions: an injunction is a coercive order of the court issued *in personam* and punishable by contempt; a stay temporarily deprives an order of the force of law pending further review and is not a coercive order operating against a person. Both the U.S. Code and the federal rules reflect the distinct meanings of "stay" and "enjoin." No serious plain language approach can treat the two terms as "interchangeabl[e]." *See* Resp. Br. 14.

Second, the Government suggests that the relief Petitioner seeks is not a stay at all, but rather "is naturally characterized as an injunction." *Id.* In the Government's view, a reviewing court can never stay an agency order because the court and the agency are not part of a "'single unified process' in the Article III courts," *id.* at 16, so when a petitioner asks a court to stay his final order of removal, he is in fact asking the court to enjoin the Department of Homeland Security ("DHS") from removing him. But that would surely come as a surprise to Congress, which expressed in § 1252(b)(3)(B) that the relief Petitioner seeks is not an injunction against removal but a "Stay of order." Moreover, the Government's novel "single unified process" theory is flatly at odds with both this Court's precedents concerning stays of agency orders and the existence of the Federal Rule of Appellate Procedure expressly governing them. *See* Fed. R. App. P. 18.

Third, the Government contends that § 1252(f)(2) must extend to stays despite its reference only to injunctions because otherwise § 1252(f)(2) would have no application at all. *See* Resp. Br. 25-26. This argument again assumes that there is no difference between a stay and an injunction. In fact, however, there is—an alien can seek to stay the order of removal, and can separately seek an injunction against agency officials. Every time an alien seeks an injunction rather than (or in addition to) a stay, § 1252(f)(2) serves to deny that relief unless its stringent standard is met—a situation that would arise, for example, if the agency were to attempt removal in disregard of a stay. The text confirms this: if the sole purpose of § 1252(f)(2) was to limit courts' authority to issue a stay, Congress would have used the term stay, as it did in § 1252(b)(3)(B), rather than the term "enjoin." Additionally, § 1252(f)(2) would apply whenever an individual alien seeks injunctive relief in proceedings collateral to the petition for review process, including habeas corpus proceedings or other district court cases challenging the immigration laws. Such proceedings have continued to arise after IIRIRA. It is thus unnecessary to distort the text of § 1252(f)(2) in order to give the section meaning.

Nor can the Government benefit by emphasizing that the purpose of IIRIRA was to make it harder for petitioners to obtain a stay, because application of the traditional stay standard is entirely faithful to that purpose. The enactment of IIRIRA marked a dramatic shift from a scheme in which stays in most cases were automatic to one in which a petitioner may not obtain a stay without meeting the traditional stay test—a test which even the Government describes as "demanding." *See* Resp. Br. 46. The reality is that under the traditional stay standard, many petitioners will adjudicate their cases from abroad after removal. It is not necessary to read IIRIRA as adopting the Government's draconian approach—in which the equities are entirely irrelevant—in order to give the statute its intended effect.

Finally, the Government's alternative argument that application of the traditional stay standard requires the denial of relief for Petitioner is beyond the scope of the question on which certiorari was granted. It is also incorrect because Petitioner has a strong likelihood of success and a compelling case on the equities, and thus is entitled to a stay under the traditional standard.

I. THE TEXT AND STRUCTURE OF IIRIRA DEMONSTRATE THAT § 1252(f)(2) DOES NOT APPLY TO STAYS OF REMOVAL ORDERS PENDING APPEAL.

A. The Plain Text of § 1252(f)(2) Contemplates Injunctions, Not Stays.

In § 1252(f)(2), Congress did not use the word "stay." It instead chose the word "enjoin." The Government concedes that "the term 'enjoin' or 'injunction' does not necessarily include a 'stay' in every context." Resp. Br. 18. It nonetheless contends that in this instance, Congress used the terms "interchangeably," *id.* 14, with a stay of removal constituting an injunction because it "require[s] DHS to abstain from . . . remov[ing] . . . [the] alien." *id.* 13 (internal quotation marks omitted; alterations in original). This analysis is flawed.

First, the Government's argument is at odds with the statutory text. In the same provision in which Congress specified that all stays would be discretionary, it further provided that the stay is a "Stay of order." 8 U.S.C. § 1252(b)(3)(B).[1] Congress thus made clear that the relief Petitioner seeks is a stay of his underlying removal *order*, not an injunction against DHS officials.

Second, the Government's argument is at odds with settled understandings regarding the differences between stays and injunctions. As the Government concedes, the defining feature of an injunction is that it operates *in personam*: it is "'[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury.'" Resp. Br. 13 (citation omitted). A stay of a removal order is not directed at the DHS officials who execute the order; it simply suspends the operation of a final order of removal pending review, and it is directed at the order itself. Indeed, a stay of a removal order is not an injunction precisely because it targets the order and *not* a party.

The Government concedes this distinction, *see* Resp. Br. 16, but denies that it makes a difference, *see id.* 17. It does. A party who violates an injunction faces contempt. *See Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). But a party does not "violate" a stay because the stay is not directed at the party; thus, courts have not imposed contempt sanctions against government agents for executing removal orders that have been stayed. Such action is unlawful, but it is unlawful for the same reason that deporting *anyone* without a valid order of removal is unlawful—because a valid removal order is a legal prerequisite to removal. *See Lazo v. Gonzales*, 462 F.3d 53, 54 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 2909 (2007); 8 U.S.C. § 1227(a). Like a declaratory judgment, a stay of an order "is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt." *Steffel v. Thompson*, 415 U.S. 452, 471 (1974) (internal quotation omitted); *cf. Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993); *H.K. Porter Co. v. Nat'l Friction Prods. Corp.*, 568 F.2d 24, 26-27 (7th Cir. 1977); *Berry v. Midtown Serv. Corp.*, 104 F.2d 107, 111 (2d Cir. 1939).[2]

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[1] While a provision's title is not necessarily controlling, *see INS v. St. Cyr*, 533 U.S. 289, 308-09 (2001), it is "'of use . . . when [it] shed[s] light on some ambiguous word or phrase,'" *id.* (citation omitted; alterations in original); *see also Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999) (invoking the title of § 1252(f) to explain that it is "nothing more or less than a limit on injunctive relief").

Third, the Government's argument is at odds with statutes, rules, and a body of jurisprudence reflecting the distinction between stays and injunctions. Not only does appellate jurisdiction often depend upon this distinction, *see* 28 U.S.C. § 1292(a)(1); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), but different rules apply depending upon whether the relevant court issues a stay or an injunction. *Compare* Fed. R. App. P. 8(a)(2)(B)(i) *with id.* R. 8(a)(2)(B)(iii); *see also id.* R. 18(a)(2)(B)(iii); Fed. R. Civ. P. 65(d)(1); *id.* R. 52(a)(2).[3] Specifically in the agency context, Congress has provided that an "injunctive decree shall specify the federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance." 5 U.S.C. § 702. Stays of agency orders, by contrast, have no such requirement. *See* Fed. R. App. P. 18. Moreover, the courts have followed Congress's lead, applying the federal rules governing *stays* to motions such as Petitioner's. *See, e.g.*, *Koutcher v. Gonzales*, 494 F.3d 1133, 1134-35 (7th Cir. 2007); *Lim v. Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004); *Singh v. Ashcroft*, 375 F.3d 1007, 1008 (10th Cir. 2004). Congress legislated against the backdrop of these rules and well-settled distinctions when it chose the word "stay" in § 1252(b)(3)(B) and "enjoin" in § 1252(f)(2). *See INS v. St. Cyr*, 533 U.S. 289, 312 n.35 (2001).

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[2] Indeed, Petitioner has not found a single case where the violation of a stay of an order of an inferior court or agency was punished by contempt. Tellingly, where the government has deported an alien while the operative order of removal was stayed, courts have directed issuance of an *in personam* order enjoining the agency from removing the person. *See, e.g.*, *Singh v. Waters*, 87 F.3d 346, 350 (9th Cir. 1996) (directing district court to issue an *in personam* order to the INS "not to violate the stay of deportation"); *cf. Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1306 (N.D. Ala. 2005) (describing court's entry of a preliminary injunction enjoining further violation of a stay). These courts did *not* impose contempt sanctions.

Nor does the Government's argument find support in the Hobbs Act. *See* Resp. Br. 14-15. The Hobbs Act distinguishes between stays and injunctions: Congress permits a court to issue both a

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[3] The Government argues that the district court rules do not apply in the courts of appeals, *see* Resp. Br. 21, but that is beside the point. Within each set of rules, there is a longstanding and operative distinction between stays and injunctions.

"temporary stay" and an "interlocutory injunction" pending review of agency action, 28 U.S.C. § 2349(b), and authorizes "[t]he court of appeals . . . to vacate stay orders *or* interlocutory injunctions previously granted by any court . . . ." *id.* § 2349(a) (emphasis added). In any event, Petitioner does not argue that the terms may *never* be used in combination, but rather that when Congress wishes to do so, it does so explicitly. *See also, e.g.*, 28 U.S.C. § 2283.[4]

B. The Fact That a Stay Limits the Government's Ability to Effectuate Removal Does Not Turn the Stay Into an Injunction.

There is no merit to the Government's contention that the term "enjoin" in (f)(2) must necessarily encompass a stay because a stay prevents an alien's removal. *See* Resp. Br. 13-14.

First, when Congress intends to encompass every form of equitable relief that affects the Government's ability to deport someone, it uses expansive language and not the solitary word "enjoin." It did so in the subsection immediately preceding § 1252(f)(2), *see* § 1252(e)(1)(A) (expressly limiting the availability of "declaratory, injunctive, or *other equitable relief* in any action pertaining to an order to exclude an alien"), and in § 1252(f)(1) (stating that no court shall have jurisdiction to "enjoin *or restrain*"); *cf. Hecht Co. v. Bowles*, 321 U.S. 321, 328 (1944) (characterizing an order placing proceedings on hold as an "other order" where the statute provided for a "permanent or temporary injunction, restraining order, or other order"). The juxtaposition of § 1252(f)(2) with these subsections belies the Government's assertion that "enjoin," standing alone, is sufficiently "expansive" to encompass stays. *See* Resp. Br. 12.

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[4] The Anti-Injunction Act speaks of an "injunction to stay" state court proceedings because when a federal court enjoins a parallel state court proceeding, it neither "freezes its own proceedings or suspends the operation of its own decisions or those of an inferior court pending further review," Resp. Br. 16; rather, it acts against a distinct sovereign, over which it exercises no supervisory jurisdiction. Thus an "injunction to stay" is required.

Second, the Government's argument proves too much. The vacatur of a removal order has the same effect on the government's ability to deport an alien as a stay, yet the Government concedes that a vacatur is not an injunction. *See* Resp. Br. 25. Its explanation is ipse dixit: "a court that concludes that an alien is entitled to relief in connection with a petition for review does not enjoin the removal of [that] alien; instead, [it] vacate[s] the agency's final order of removal." *Id.* (quotation marks omitted; alterations in original). One could just as easily say that a court granting a stay "does not enjoin the removal of that alien; instead, it stays the agency's final order of removal." In fact, a vacatur is not an injunction (despite its similar effect) because a vacatur is not a coercive order issued against a person and punishable by contempt. Instead, like a stay, a vacatur deprives the order of removal of the force of law. Removal following a vacatur or stay is certainly unlawful, not because the agency has "violated" the vacatur or stay, but because it is unlawful for an official to remove someone without a valid removal order.

To be sure, stays and injunctions often have similar effects on the course of a proceeding, and courts have traditionally applied a similar test in evaluating whether to grant a stay or injunction. But that similarity merely reflects that both remedies arise at an early stage of a proceeding, when it is appropriate for the court to consider a party's likelihood of success along with the equities that weigh for and against providing relief at that early time.[5] These similarities do not justify disregarding Congress's use of distinct terms with discrete and well-settled meanings.

C. The Fact That the Order to Be Stayed Came From an Agency Rather Than a Court Does Not Turn the Stay Into an Injunction.

Similarly meritless is the Government's novel argument that a "stay" of an agency order is necessarily an injunction because agency review is not part of a "'single unified process' in the Article III courts."[6] *See* Resp. Br. 16-17.

First Congress routinely references "stays" to denote the suspension of final agency orders pending judicial review. It did so in the Hobbs Act, *see supra*

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[5] This also explains why dicta from otherwise inapplicable cases sometimes equate injunctions to stays, *see* Resp Br. 15.

[6] For one thing, this incorrectly assumes that all orders of removal come from an administrative agency. *See, e.g.*, 8 U.S.C. § 1228(c)(1) (granting district courts authority to issue judicial orders of removal at the time of sentencing of certain deportable aliens). The Government does not and cannot plausibly suggest that Congress intended § 1252(f)(2) to apply to administrative, but not judicial, removal orders.

7-8, in other areas of administrative law, *see, e.g.*, 27 U.S.C. § 204(h); 29 U.S.C. § 2937(a)(2); 42 U.S.C. § 300j-9(i)(3)(A), in the Federal Rules of Appellate Procedure, *see* Fed. R. App. P. 18, and in IIRIRA itself, *see* 8 U.S.C. § 1252(b)(3)(B). Indeed, if, as the Government argues, a court can never stay an agency order, then this Court must conclude that when Congress said "Stay of order" in § 1252(b)(3)(B), what it meant was an injunction against the execution thereof. This Court, however, should reject the invitation to rewrite statutes where Congress has made itself clear. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 483, 454 (2002); *U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 498 (1994).

Moreover, this Court has stated clearly that the federal courts have the same inherent power to issue a stay when reviewing an agency order that they have when reviewing a district court order. *See Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9-11 (1942); *see also Sampson v. Murray*, 415 U.S. 61, 73-74 (1974) ("A long progression of cases in this Court ha[s] established the authority of a court, empowered by statute to exercise appellate jurisdiction, to issue appropriate writs in aid of that jurisdiction. . . . This Court in *Scripps-Howard* held that the same principles govern[] the authority of courts charged by statute with judicial review of agency decisions, and that the authority to grant a stay exists in such a court . . .").

The Government also suggests that the "unique features of immigration proceedings," Resp. Br. 18—

apparently that orders of removal are self-executing—demonstrate that a stay of an order of removal is an injunction. But the fact that an order is self-executing does not change that the object of a stay of removal is the removal order, not its execution. *See* § 1252(b)(3)(B). Moreover, no statute or procedural rule supports the argument that the distinction between self-executing and non-self-executing agency orders bears on the distinction between stays and injunctions, *see, e.g.*, Fed. R. App. P. 18, a fact that seems particularly relevant because self-executing agency orders are the rule, not the exception. *See NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142-43 (7th Cir. 1992).

In short, that the order on review comes from an agency rather than a district court is irrelevant to the question of whether the relief sought is a stay or an injunction.

D. The Structure of IIRIRA Confirms That § 1252(f)(2) Does Not Apply to Stays Pending Judicial Review.

The Government's position that § 1252(f)(2) encompasses stays cannot be reconciled with numerous structural features of IIRIRA suggesting the contrary. *See* Pet. Br. 32-38.

First, in response to Petitioner's argument that the Government's construction of § 1252(f)(2) renders § 1252(b)(3)(B) surplusage, *see* Pet. Br. 35-36, the Government observes that § 1252(b)(3)(B) serves to "make explicit that [Congress] was eliminating" the prior rule whereby stays were automatic for everyone but certain felons. *See* Resp. Br. 27. But Congress explicitly eliminated the automatic stay when it repealed 8 U.S.C. § 1105a(a)(3) simultaneous with the enactment of IIRIRA. Congress did not need to enact a separate statutory provision reiterating that § 1105a(a)(3) had been repealed.

Second, the Government's construction of "enjoin" in § 1252(f)(2) deprives the term "restrain" in § 1252(f)(1)—and its disparate exclusion in § 1252(f)(2)—of meaning. The Government's theory that the terms "restrain" and "enjoin" are synonymous, *see* Resp. Br. 28, does not explain why Congress used the phrasing "enjoin or restrain" in § 1252(f)(1) but only "enjoin" in § 1252(f)(2). *See* Pet. Br. 36-37.

Third, the Government contends that "[b]ecause Section 1252(b)(3)(B) does not provide a standard for evaluating stays of removal, it is natural to look to another part of Section 1252 for such a standard." Resp. Br. 24. The Government cites no case in support of this theory, and for good reason: it is not natural to assume that Congress would enact a provision granting courts authority to issue stays in one part of a statute, and then specify the standard for exercising that authority in a different part of the statute that neither cross-references the first provision nor includes the word "stay." This would have been "at best, an awkward and indirect means" to go about it. *Miller v. French*, 530 U.S. 327, 338 (2000). Moreover, if Congress believed it necessary to specify a standard for discretionary stays, it would be odd for Congress to have done so for cases subject to IIRIRA's permanent rules but *not* for transitional cases, as the Government contends. *See* Pet. Br. 35; Resp. Br. 28. It is much more natural to assume that when Congress repeatedly authorizes courts to issue stays of removal orders without specifying a standard, in provisions using nearly identical language, *see* 8 U.S.C. § 1252(b)(3)(B); IIRIRA § 306(b), 110 Stat. at 3009-612 (repealing 8 U.S.C. § 1105a(a)(3) (1994)); IIRIRA § 309(c)(4)(F), 110 Stat. at 3009-626, Congress intends all such provisions to incorporate the same standard—in this case, the traditional one.[7]

E. Canons of Statutory Interpretation Counsel Against the Government's Interpretation of 1252(f)(2).

Even if § 1252(f)(2) were ambiguous as to whether the use of the word "enjoin" also encompasses stays, the interpretive canons adopted by this Court compel the conclusion that the statute should be read to not apply to stays. *See* Pet. Br. 18-20; *see also Scripps-Howard Radio*, 316 U.S. at 11. The Government maintains that the clear statement rule is inapplicable because its reading of § 1252(f)(2) does not *eliminate* the court of appeals' authority to issue a stay; it merely *circumscribes* it. *See* Resp. Br. 42. But this Court has rejected the idea that the clear statement rule applies only to statutes that completely eliminate—rather than merely limit—courts' inherent equitable powers. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (A court's "equitable jurisdiction is not to be denied *or limited* in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, *the full scope* of that jurisdiction is to be recognized and applied." (emphasis added)). Given that the highly constricting standard in § 1252(f)(2) would prohibit courts from issuing stays in all but a narrow set of circumstances, *see infra* at 23-25, and totally prohibits them from considering traditional equitable factors, *see infra* at 23, the Government's reading of § 1252(f)(2) unquestionably strips courts of their "customary power to stay orders under review." *Scripps-Howard*, 316 U.S. at 11.

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[7] The Government contends that Congress did not apply a heightened standard in transitional cases "in order not to upset automatic stays . . . that were already in effect." Resp. Br. 28. But the transitional rules did not apply to cases in which an automatic stay had already issued, *see* IIRIRA § 309(c)(1) and (c)(4), 110 Stat. at 3009-625-26, and so neither the transitional *nor* the permanent rules under IIRIRA upset existing stays. The Government speculates that Congress chose this course to provide notice to aliens going forward that it would be more difficult to get a stay under the permanent rules. Yet IIRIRA made it substantially more difficult to get a stay under the *transitional* rules since a stay was no longer automatic. More importantly, while Congress *could* certainly choose such an anomalous way of applying new rules, the Government fails to provide any evidence that Congress did.

The Government further posits that this canon does not apply because in IIRIRA, Congress evinced a general intent to "shift discretion from the courts." Resp. Br. 42. This is precisely the sort of inferential reasoning—purpose divorced from text—that the clear statement rule exists to counteract. Because § 1252(f)(2) does not contain the requisite "clear[] command" or "inescapable inference," this Court should not construe the statute to displace the courts' traditional equitable authority. *See Miller*, 530 U.S. at 340.

The Government is also unable to surmount "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Dada v. Mukasey*, 128 S. Ct. 2307, 2318 (2008) (quotation marks omitted). Contrary to the Government's apparent suggestion that the immigration rule of lenity was overruled by a dictum in a case from 1984, *see* Resp. Br. 45, this Court has repeatedly reaffirmed the canon in recent years; *see, e.g., Dada*, 128 S. Ct. at 2318; *St. Cyr*, 533 U.S. at 320. Section 1252(f)(2) is clearly a "deportation statute." This canon of construction therefore applies as well.

In light of these guiding principles, the Government has not met its burden to demonstrate that the text of § 1252(f)(2) unambiguously restricts the courts' inherent equitable power to issue stays.

II. SECTION 1252(f)(2) APPLIES SEPARATE AND APART FROM THE STAY CONTEXT.

Faced with the evidence of IIRIRA's plain meaning, the Government insists that § 1252(f)(2) must apply to stays, or else it would have no application at all. *See* Resp. Br. 25-26. This argument is meritless. Section 1252(f)(2) has application separate and apart from the stay context, and the Government's suggestion that § 1252(f)(2) is *solely* about stays of removal ignores the text and structure of § 1252(f).

Although § 1252(f)(2) was not added to the statute until just before its enactment,[8] and there is virtually no legislative history pertaining to it, *see* Resp. Br. 32 n.8, Congress's evident purpose in enacting § 1252(f)(2) was to clarify that injunctions should be granted only in extraordinary circumstances. Injunctions are uniquely coercive orders, and Congress wanted to limit such injunctions to exceptional individual cases. This purpose is also reflected in § 1252(f)(1), which prohibits injunctive relief in certain class actions.[9]

Contrary to the Government's contention, § 1252(f)(2) has clear application "under this section." *See* Resp. Br. 26. Section 1252(f)(2) applies in every instance when an alien seeks an injunction from the court of appeals in connection with his petition for review. In every such case, § 1252(f)(2) prohibits the court from entering an injunction unless the entry or execution of the alien's removal order is clearly prohibited by law—for example, if DHS attempts removal of an alien in disregard of a stay of the alien's removal order. *See supra* at 6 & 6 n.2. Imposing a high standard for injunctions in the direct review context ensures that in all but the most extraordinary cases, the relief available to aliens on direct review of final orders of removal is limited to stays, vacaturs, and the granting of their petition for review. The Government's argument that § 1252(f)(2) "has no application" thus rises and falls with its contention that the stay Petitioner seeks here is really an injunction. Because that contention is wrong, and because an alien could seek either an injunction or a stay (or both), § 1252(f)(2) operates whenever the alien seeks an injunction and not just a stay.

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[8] *Compare* H.R. Rep. No. 104-469(I), at 33 (1996) (omitting the provision), *and* S. Rep. No. 104-249, at 34 (1996) (reporting an amendment to eliminate automatic stays, but including no amendment to add (f)(2)), *with* H.R. Conf. Rep. No. 104-863, at 626 (1996) (including new (f)(2)).

[9] Congress may also have wished to negate any inference from § 1252(f)(1) that injunctions for individuals should issue routinely. That is, § 1252(f)(1) expressly bars injunctive relief for class actions, but permits injunctions for individual aliens. Section 1252(f)(2) forestalls any argument that such injunctions are available as a matter of course.

Section 1252(f)(2) also applies where an alien seeks to prevent his removal outside the context of a petition for review, both in habeas proceedings and in "general collateral challenges to unconstitutional practices and policies used by the agency." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492 (1991). Congress gave multiple indications of its intent that § 1252(f)(2) applies in these contexts. As the Government itself notes, *see* Resp. Br. 12, Congress applied § 1252(f)(2) to *all* courts rather than just the courts of appeals. *Compare* § 1252(f)(2), *with* § 1252(b)(4)(A), § 1252(a)(4), *and* § 1252(a)(5). Congress also addressed § 1252(f)(2) to "any alien" rather than "any petitioner." *Compare* § 1252(f)(2), *with* § 1252(e)(4), § 1252(b)(5)(A), *and* § 1252(b)(6). Moreover, Congress centered the court's inquiry in § 1252(f)(2) on whether the "entry or execution" of a removal order is clearly prohibited by law, not whether the removal order itself is unlawful. Because direct review in the court of appeals is focused on the order itself, *see* § 1252(b)(9), this phrasing in § 1252(f)(2) suggests that Congress envisioned it would apply in collateral attacks challenging the way a removal order was entered or executed. Finally, this Court has made clear that Congress did not totally preclude habeas review of a removal order in IIRIRA. *See St. Cyr*, 533 U.S. at 311 n.34, 312.[10]

Indeed, it is hardly "difficult to imagine" a collateral challenge in which an alien might seek an injunction against removal. *See* Resp. Br. 25. As the Government is well aware, aliens have sought and obtained such injunctive relief against removal in collateral challenges since IIRIRA's enactment, and notwithstanding §§ 1252(b)(9) and (g). *See, e.g.*, *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1145, 1150 (9th Cir. 2000) (en banc) ("*CSS*"); *Walters v. Reno*, 145 F.3d 1032, 1051-53 (9th Cir. 1998); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234 (9th Cir. 1999), *supplemented by*, 236 F.3d 1115 (9th Cir. 2001); *cf. Gonzales v. Dep't of Homeland Sec.*, 508 F.3d 1227, 1232-33 (9th Cir. 2007); *see also Aguilar v. U.S. Immigr. & Customs Enforcement Div. of Dep't of Homeland Security*, 510 F.3d 1, 10-12 (1st Cir. 2007) (stating that § 1252(b)(9) "cannot be read to swallow all claims that might somehow touch upon, or be traced to, the government's efforts to remove an alien"). In all such cases, an individual seeking an injunction must overcome the standard set forth in § 1252(f)(2) in order to enjoin his removal, and contrary to the Government's argument, *see* Resp. Br. 25-26, neither § 1252(b)(9) nor § 1252(g) precludes jurisdiction. *See CSS*, 232 F.3d at 1150 ("As interpreted by the Supreme Court . . . , [§ 1252(g)] applies only to the three specific discretionary actions mentioned in its text, not to all claims relating in any way to deportation proceedings."). The Government's further observation that § 1252(f)(2) has not yet been invoked in these contexts merely reflects the Government's legal strategy and its own reading of the section, *not* Congress's intent.

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[10] While the REAL ID Act of 2005 modified the ability of aliens to pursue habeas relief in the district courts, *see* REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a), 119 Stat. 231, 310 (codified at 8 U.S.C. § 1252(a)(5)), this does not alter Congress's intent in 1996 *nunc pro tunc*. And pursuant to § 1252(e)(2), habeas relief remains available to aliens subject to expedited removal.

In any event, the Government's suggestion that § 1252(f)(2) was intended to apply *only* to requests for stays is contrary to the text. If Congress intended § 1252(f)(2) to extend only to stays, it surely would not have used two different words—"stay" in § 1252(b)(3)(B) and "enjoin" in § 1252(f)(2)—to mean precisely the same thing. In fact, Congress intended § 1252(b)(3)(B) to govern stays and § 1252(f)(2) to provide the standard for injunctive relief, not stays. Section 1252(f)(2) is simply not the magic bullet that the Government claims it to be.

III. APPLYING THE TRADITIONAL STAY STANDARD FURTHERS THE PURPOSE OF IIRIRA, WHILE AVOIDING THE DISASTROUS CONSEQUENCES OF APPLYING THE § 1252(f)(2) STANDARD.

Lacking support in the text and structure of IIRIRA, the Government insists that only its reading of § 1252(f)(2) is consistent with the purpose of the statute. But even if the perceived purpose of IIRIRA could override its plain text, the Government cannot benefit because Petitioner's interpretation is entirely faithful to IIRIRA's purpose.

First, under Petitioner's approach, it is substantially more difficult to obtain a stay of removal after IIRIRA than it was beforehand. Prior to IIRIRA, most petitioners were entitled to an automatic stay pending judicial review. After IIRIRA, a petitioner may obtain a stay of his final order of removal only if he can meet the traditional four-factor test—which even the Government describes as "demanding." *See* Resp. Br. 46. More than a mere "possibility" of relief is required, *see* Resp. Br. 47, and stays are certainly not automatic. Indeed, in the eight circuits that have applied the traditional test since 1996, stays are regularly denied, including in some of the very cases in which the circuits determined that § 1252(f)(2) did not apply. *See Hor v. Gonzales*, 400 F.3d 482 (7th Cir. 2005); *Mohammed v. Reno*, 309 F.3d 95 (2d Cir. 2002); *Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001) (en banc); *cf. Lim*, 375 F.3d at 1012. Interpreting IIRIRA to require petitioners to meet the traditional stay standard in no sense "thwarts Congress's purposes," Resp. Br. 35, and there is no merit to the Government's suggestion that its interpretation is necessary to ensure that illegal aliens "do not overstay their welcome," *id.*

The Government's argument that applying the traditional stay standard would encourage illegal aliens to delay their removal by filing non-meritorious petitions is specious.[11] *See* Resp. Br. 36. As noted, the traditional stay standard is a rigorous one under which frivolous motions are expeditiously denied.

Moreover, as noted in Petitioner's Opening Brief, the Government's reading of § 1252(f)(2) would produce extraordinarily harsh consequences. *See* Pet. Br. 40-46. In an effort to mitigate those consequences, the Government offers a novel construction of § 1252(f)(2)'s standard. Section 1252(f)(2) requires "clear and convincing evidence that the entry or execution of [a final removal order] is prohibited as a matter of law." The Government argues here that this provision is really two standards in one: § 1252(f)(2) requires aliens to prove fact-based claims by clear and convincing evidence, and to show "that they are entitled to judgment as a matter of law" on legal claims. *See* Resp. Br. 37-38. That splitting of § 1252(f)(2)'s unitary test is contrary to the Government's position before the Fourth Circuit. *See* Resp. Opp. to Pet. Mot. to Stay Removal, No. 08-1813, at 8 (4th Cir. filed Aug. 13, 2008) (arguing that a petitioner must show "'by clear and convincing evidence' that his removal is 'prohibited by law,'" and that this standard "demands 'more than [a] show[ing of] a likelihood of success on the merits.'" (citations omitted)). Although Petitioner certainly welcomes the Government's retreat, that it must strain the text in an attempt to lessen the impact of an unduly harsh standard confirms that the Government's reading of IIRIRA has little to recommend it.[12]

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[11] The Government's use of statistics, *see* Resp. Br. 36, confuses causation with correlation: the courts of appeals could have disparate filing rates for petitions for review due to a host of unrelated explanations, including, e.g., geographic differences, variances in the ease of obtaining appellate counsel, and a higher rate of agency error as between different circuits. *See generally* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007).

In any event, even the Government's interpretation would have grave consequences because it *completely forbids* the courts from considering equitable factors in deciding a petitioner's stay motion. The Government does not dispute that its interpretation would forbid consideration of the equities or of the possibility of irreparable harm. The Government would require courts to deny a stay to every petitioner with a 90% risk of being killed if removed and a 50% chance of succeeding on the merits. *See Kenyeres v. Ashcroft*, 538 U.S. 1301, 1305 (2003) (Kennedy, J., in chambers) ("If the exacting standard of § 1252(f)(2) applies to requests for temporary stays, then to obtain judicial review aliens subject to removal must do more than show a likelihood of success on the merits."). Indeed, in the two circuits that have adopted the (f)(2) standard, stays are virtually never granted. *See* Am. Immigration Lawyers Ass'n ("AILA") Br. 8 & n.7.

The Government dismisses these concerns by recasting them as an argument against the imposition of any standard other than an automatic stay. *See* Resp. Br. 39-40. Such a contention misreads both Petitioner's argument and the traditional stay test. When a petition has little or no chance of success, removal may well be appropriate, notwithstanding a high likelihood of harm. But where the petitioner's likelihood of success is strong (though not "clear and convincing"), it would be perverse to ignore the certainty of death or torture that would result from removal. This Court should not presume that Congress has deprived the courts of their inherent power to avoid such unjust results absent an unambiguous statement to that effect. *See Miller*, 530 U.S. at 340.

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[12] Most circuit courts have interpreted § 1252(f)(2) as creating a harsher standard than that articulated by the Government. *See, e.g., Teshome-Gebreegziabher v. Mukasey*, 528 F.3d 330, 335 n. 5 (4th Cir. 2008), *reh'g en banc denied*, 545 F.3d 285 (4th Cir. 2008); *Hor*, 400 F.3d at 483; *Andreiu v. Ashcroft*, 223 F.3d 1111, 1118 (9th Cir. 2000), *rev'd en banc sub nom. Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001).

Similarly unpersuasive is the Government's assurance that a Petitioner raising meritorious claims would remain protected by DHS's discretionary power to issue a stay. First, it appears that the Government has previously taken the opposite position, *see Sofinet v. INS*, 188 F.3d 703, 706-07 (7th Cir. 1999), even though the then-applicable regulations were similar in relevant respects to the regulations cited in the Government's brief. *Compare* Resp. Br. 41 (citing 8 C.F.R. § 241.6 (2008)), *with* 8 C.F.R. § 241.6 (1999). Second, a discretionary stay from DHS is, in practice, extraordinarily difficult to obtain. An immigrant seeking a discretionary administrative stay must meet multiple onerous requirements, some of which would be impossible for many immigrants. *See* U.S. Immigration and Customs Enforcement, *Application for a Stay of Deportation of Removal*, *available at* http://www.ice.gov/doclib/pi/forms/iceform_i-246.pdf;

see also AILA Br. 22-28. Third, as noted in Petitioner's opening brief, the high rate of error in administrative immigration courts suggests that the agency would not provide stays in all—or even most—cases where they were warranted. *See* Pet. Br. 43-44; *see also* AILA Br. 12-21. Finally, Congress has expressed, in § 1252(b)(3)(B), a desire for stays to also be available in the courts of appeals, implying that Congress itself recognized that agency relief is sometimes unavailable, inadequate, or erroneously denied.

In addition, the Government concedes that even its new interpretation of § 1252(f)(2) does not avoid the problem that aliens seeking a stay of removal would have to meet a higher—or at the very least, similar—burden to obtain a stay as they would to prevail on the merits. *See* Resp. Br. 38 (characterizing the § 1252(f)(2) standard as "similar to that on merits review."). As a result, the Government's proposed regime renders merits review entirely beside the point: resolution of a petitioner's entitlement to a stay will foreordain resolution of the merits. Requiring resolution of the same question twice would be, at the very least, a peculiar way to structure judicial review. Given the lack of textual or other support suggesting that this was Congress's intent, this Court should hold that the traditional stay standard governs motions to stay final orders of removal.

IV. WHETHER PETITIONER IS ENTITLED TO A STAY UNDER THE TRADITIONAL FOUR-FACTOR TEST IS NOT A QUESTION BEFORE THE COURT, AND IN ANY EVENT, PETITIONER MEETS THE TEST.

The Government argues in the alternative that Petitioner is not entitled to a stay under the traditional standard, or that the test should be reformulated to deny him a stay. *See* Resp. Br. 46-48. This argument is not fairly within this Court's limited grant of certiorari, which asks only which standard should apply. *See Nken v. Mukasey*, 129 S. Ct. 622 (2008).[13] Whether Petitioner is entitled to a stay under the traditional test is not fairly within the scope of this limited question. *See* Sup. Ct. R. 24(1)(a) & (2).

Even if application of the traditional stay test was fairly within the scope of certiorari, that test is well-settled and there is no need to recast it here. This Court has clearly stated that the four factors a court considers in deciding whether to grant a stay are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The fact that the courts of appeals have articulated these factors in different ways is unsurprising; as this Court has recognized, "[s]ince the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules." *Id.* at 777.

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[13] This Court's order of November 25, 2008 stated:

> [T]he petition for a writ of certiorari is granted limited to the following question: "Whether the decision of a court of appeals to stay an alien's removal pending consideration of the alien's petition for review is governed by the standard set forth in section 242(f)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1252(f)(2), or instead by the traditional test for stays and preliminary injunctive relief."

Nken v. Mukasey, 129 S. Ct. 622 (2008).

Petitioner is entitled to a stay under the traditional test for the reasons set forth in Petitioner's submissions in support of his Application for a Stay. *See* Pet'r's Emergency Mot. for a Stay of Removal Pending Adjudication of the Pet. for Review in the U.S. Ct. of Appeals for the Fourth Circuit, No. 08A413 (U.S. filed Nov. 7, 2008); Pet'r's Reply in Support of Emergency Mot. for a Stay of Removal Pending Adjudication of the Pet. for Review in the U.S. Ct. of Appeals for the Fourth Circuit, No. 08A413 (U.S. filed Nov. 18, 2008). For the reasons stated therein, this Court should decline to lift the stay it has already granted. In the alternative, however, it should vacate the Fourth Circuit's order denying Petitioner's motion to stay his final order of removal and remand to the Fourth Circuit for consideration of Petitioner's motion under the traditional stay standard.

CONCLUSION

The Court should maintain the stay that it ordered on November 25, 2008, or in the alternative, should vacate the Fourth Circuit's order denying

Petitioner's motion to stay his final order of removal and remand for reconsideration of his motion under the traditional stay standard.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

114

(3)

No. 08-681

Supreme Court, U.S.
FILED
DEC 29 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JEAN MARC NKEN,
Petitioner,
v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

BRIEF FOR AMICI CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, CATHOLIC LEGAL SERVICES, FLORIDA IMMIGRANT ADVOCACY CENTER, HEBREW IMMIGRANT AID SOCIETY, NATIONAL IMMIGRANT JUSTICE CENTER, NATIONAL IMMIGRATION LAW CENTER, PUBLIC COUNSEL, AND WORLD RELIEF SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are organizations that advocate for the rights of immigrants to fair procedures and fair treatment under U.S. and international law.[2] This case presents an issue that is fundamental to the ability of immigrants to secure meaningful judicial review of orders directing their removal from the United States, perhaps to countries where they will be subjected to persecution, torture, or murder. That issue is whether the decision of a court of appeals to stay an alien's final order of removal pending consideration of the alien's petition for review is governed by the standard set forth in Section 242(f)(2) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1252(f)(2), or instead by the traditional test for stays and preliminary injunctive relief. Amici submit the instant brief to demonstrate that applying § 1252(f)(2) to motions for temporary stays pending judicial review—which only two of the nine circuits to consider the issue have done—would place petitioners who present meritorious challenges to their removal orders at risk of irreparable harm and would be unduly burdensome on both petitioners and courts. Accordingly, the Court should maintain its November 25, 2008 stay of Mr. Nken's final order of removal or, alternatively, should vacate the Fourth Circuit's denial of

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] A list and brief description of each organization are set forth in the appendix to this brief.

Mr. Nken's motion for stay and remand with instructions to reconsider his motion under the traditional stay standard.

SUMMARY OF ARGUMENT

A ruling that 8 U.S.C. § 1252(f)(2) applies to motions for stay of a final order of removal pending a court of appeals' review of a decision of the Board of Immigration Appeals (BIA) would put petitioners with meritorious claims at risk of irreparable injury and would be procedurally burdensome on both petitioners and courts. Applying § 1252(f)(2) to stay motions would allow courts to grant a stay only if there were clear and convincing evidence not only that the BIA erred but that removal would be prohibited as a matter of law. Such a standard would not allow any consideration of equitable factors, even if the court believed that a petitioner were likely to face extreme personal danger or hardship if forced to depart the country prior to the review of his case. Further, applying § 1252(f)(2) to stay motions would create severe procedural difficulties for petitioners by requiring them to make an extremely difficult showing to the court on very tight time constraints, often without any assistance of counsel and without the benefit of a full administrative record for the court to consider.

ARGUMENT

I. PETITIONERS WITH MERITORIOUS CLAIMS WOULD INEVITABLY SUFFER IRREPARABLE HARM IF § 1252(f)(2) WERE APPLIED TO MOTIONS FOR STAY OF FINAL REMOVAL ORDERS

A ruling that 8 U.S.C. § 1252(f)(2) applies to petitioners' motions for stay would be devastating because it would not allow courts to take into account the likelihood that petitioners would suffer irreparable injury if their motions were denied. As numerous past cases demonstrate, the logical, almost mathematically inevitable result of such a ruling—coupled with the heightened requirement that the petitioner show by "clear and convincing evidence" that removal is legally prohibited—would be the removal of petitioners with meritorious challenges to their removal orders while their cases are still pending in the courts, even if such removal would cause them serious harm, and even if the court was likely ultimately to grant relief. As a practical matter, applying § 1252(f)(2) to motions for stay would effectively end many petitions for review before they even begin, with potentially dire consequences.

A. Applying § 1252(f)(2) To Motions For Stay Would Not Allow Courts To Consider The Risk Of Irreparable Harm

When applying the traditional stay standard to motions for stay of a final removal order pending review of a BIA decision, courts have considered the petitioner's chances of success on the merits, the likelihood that the petitioner will suffer irreparable harm if a stay is denied, and other equitable factors.[3] This standard, though flexible, is demanding, and if the petitioner does not make the requisite showing (including the showing of irreparable harm), the court will deny the motion.[4]

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[3] *See, e.g.*, *Tesfamichael* v. *Gonzales*, 411 F.3d 169, 172 (5th Cir. 2005); *Douglas* v. *Ashcroft*, 374 F.3d 230, 233-234 (3d Cir. 2004); *Arevalo* v. *Ashcroft*, 344 F.3d 1, 7-9 (1st Cir. 2003).

[4] *See, e.g.*, *Chambers* v. *Mukasey*, 520 F.3d 445, 451 (5th Cir. 2008) (denying motion for stay of removal under traditional test);

By contrast, if § 1252(f)(2) were applied to motions for stay of a final removal order, it would require that the movant show "by clear and convincing evidence that the entry or execution of [the removal] order is prohibited as a matter of law." Thus, unlike the traditional standard for granting stays and preliminary injunctive relief, § 1252(f)(2) would mandate that courts ignore three of the traditional stay factors, including whether the petitioner could suffer irreparable harm if the stay were denied. The inability to consider the possibility of irreparable injury would make it virtually certain that stays will be denied in meritorious cases and that those petitioners will suffer irreparable harm as a result. For many such petitioners, "irreparable harm" is literally a matter of life and death.

Indeed, under § 1252(f)(2), even if a court of appeals believed that a petitioner were *likely* to prevail on the merits (but not by clear and convincing evidence that the petitioner's removal was prohibited as a matter of law), and were *guaranteed* to suffer irreparable harm if forced to leave the country, the court would still be compelled to deny a stay. As Judge Easterbrook put it:

> [The need for a stay] may remain vital when the alien seeks asylum or contends that he would be subject to torture if returned. The ability to come back to the United States would not be worth much if the alien has been

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Zheng v. *Mukasey*, 507 F.3d 1074, 1076 (7th Cir. 2007) (same); *Lim* v. *Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004) (same); *Andreiu* v. *Ashcroft*, 253 F.3d 477, 483-484 (9th Cir. 2001) (en banc) (same); *see also Mohammed* v. *Reno*, 309 F.3d 95, 102-103 (2d Cir. 2002) (denying stay under traditional standard but delaying mandate to allow petitioner to ask Supreme Court for relief).

> maimed or murdered in the interim. Yet under the Attorney General's reading of § 1252(f)(2) an alien who is likely to prevail in this court, and likely to face serious injury or death if removed, is not entitled to remain in this nation while the court resolves the dispute.

Hor v. *Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005); *see also Tesfamichael* v. *Gonzales*, 411 F.3d 169, 175 (5th Cir. 2005).

Although irreparable harm can befall many categories of aliens who are removed pending review of their cases,[5] the possibility of such injury is particularly grave for those petitioners who have meritorious grounds for asylum, withholding of removal, or protection under the Convention Against Torture. *See, e.g.*, 8 C.F.R. § 1208.13(b) (subject to certain limitations, an alien qualifies as a refugee and can qualify for asylum where "he or she has suffered past persecution or because he or she has a well-founded fear of future persecution"); *id.* § 1208.16(b) (requiring withholding of removal if an alien can establish that "his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion"); *id.* § 1208.16(c)(2) (requiring withholding of removal under the Convention Against Torture if an alien can "establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal"). In such cases, the likelihood of irreparable harm is, in essence, itself the ground on which the alien seeks relief. Moreover, to be eligible for asylum, the applicant need not prove that he *would* be persecuted if returned, but only that he has a *well-founded fear* of such persecution. *See* 8 U.S.C. § 1101(a)(42)(A); *INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 423 (1987). The prospect of removal pending judicial review of a likely erroneous denial of asylum is thus particularly troublesome, and many successful petitions for review are in fact asylum cases. *See, e.g.*, Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 362 (2007) (in 2004 and 2005, federal courts remanded 650 petitions for review in asylum and related cases rather than affirming the BIA's decision on the merits).

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[5] *See, e.g.*, *Ahmed* v. *Mukasey*, 548 F.3d 768, 2008 WL 4925056 (9th Cir. Nov. 19, 2008) (stay granted May 4, 2004) (stay granted May 28, 2004) (stay granted to petitioner who was applying for adjustment of status based on marriage to a U.S. citizen); *Borges* v. *Gonzales*, 402 F.3d 398, 401, 404 (3d Cir. 2005) (same); *Bejjani* v. *INS*, 271 F.3d 670, 687-689 (6th Cir. 2001) (granting stay under traditional standard to lawful permanent resident), *abrogated in part on other grounds*, *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006).

Congress has recognized that it is particularly important that applicants for asylum have the opportunity for meaningful judicial review of removal orders entered against them. Congress has excepted asylum determinations from its general preclusion of judicial review of discretionary decisions taken by the Attorney General under Title II of the Immigration and Nationality Act. *See* 8 U.S.C. § 1252(a)(2)(B); *see also* T.A. Aleinikoff et al., *Immigration and Citizenship* 1152 (6th ed. 2008). If the standard of § 1252(f)(2) were applicable in such cases, many asylum applicants would effectively lose their ability to secure judicial review of their removal orders. Holding asylum applicants who are at risk of irreparable harm to § 1252(f)(2)'s stringent stay standard would therefore undercut Congress's provision for meaningful judicial review of denials of asylum.[6]

B. A "Clear and Convincing" Evidence Standard Would Make Stays Impossible For Many Petitioners With Strong Cases On The Merits

The danger that petitioners with meritorious claims would be removed while their cases are still in the courts if § 1252(f)(2) were applicable to motions for stay is amplified by that provision's demand for "clear and convincing evidence that the entry or execution of [the removal] order is prohibited as a matter of law." As this Court has stated, the "standard of clear and convincing evidence" lies "between a preponderance of the evidence and proof beyond a reasonable doubt." *Addington* v. *Texas*, 441 U.S. 418, 425 (1979). Several courts have observed that applying § 1252(f)(2) to stay motions would require the petitioner to meet a standard that is not only higher than the traditional stay standard, but also significantly more demanding than the standard that the court will eventually apply on the merits. *See Tesfamichael*, 411 F.3d at 175; *Arevalo* v. *Ashcroft*, 344 F.3d 1, 8 (1st Cir. 2003); *Mohammed* v. *Reno*, 309 F.3d 95, 100 (2d Cir. 2002); *Andreiu* v. *Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001) (en banc). In *Arevalo*, Judge Selya also observed that applying § 1252(f)(2) to stay motions "would necessitate full deliberation on the merits of the underlying case." 344 F.3d at 8.

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[6] Indeed, the dangers that applicants for asylum and withholding of removal could face if they are forced to meet § 1252(f)(2)'s standard has implications not only for the petitioners themselves, but also for the United States' obligations under international law. The premature deportation of petitioners with ultimately meritorious claims could breach this country's commitment to protect refugees under the United Nations Convention Relating to the Status of Refugees, July 5, 1951, 189 U.N.T.S. 150. As this Court has noted, Congress incorporated this international obligation into U.S. law by prohibiting the refoulement of refugees. *See INS* v. *Stevic*, 467 U.S. 407, 426 n.20 (1984) (summarizing legislative history of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102). Under the Fourth and Eleventh Circuits' application of § 1252(f)(2), it would be inevitable that some who in fact merit refugee status would be returned to their persecutors.

Although the lower courts have not ruled definitively on what types of error might qualify as "clear and convincing evidence that the entry or execution of [the removal] order is prohibited as a matter of law" so as to justify a stay under § 1252(f)(2), Judge Easterbrook has suggested that "[a]s a practical matter," such a stay would be permissible "only when the person is a citizen of the United States or holds a visa of unquestioned validity" or perhaps is "[a] diplomat, or an alien who prevailed before the Board but was threatened by a rogue subordinate who refused to acknowledge the Board's authority." *Hor*, 400 F.3d at 483; *see also Tesfamichael*, 411 F.3d at 173 ("[T]he adoption of the standard urged by the government would render stays of deportation almost impossible to obtain."). *But see Weng* v. *Attorney General*, 287 F.3d 1335, 1340 (11th Cir. 2002) (holding that "aliens who can show clear-cut errors under established law will receive stays" under § 1252(f)(2)).[7] In any event, there is no question that many aliens with strong claims would face a high, and often insurmountable, burden under § 1252(f)(2)—indeed, the fact that the § 1252(f)(2) standard is so distinct from the petition for review standard is another reason to believe that it was not directed against stays pending a petition for review.

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[7] Although the Eleventh Circuit in *Weng* seemed to allow for the possibility of granting stays to people outside the categories listed by Judge Easterbrook, in practice the court has granted stays at an exceedingly low rate, even for those petitioners who eventually prevailed on the merits. Based on our research, of all reported published and non-published decisions where the Eleventh Circuit eventually *granted* an alien's petition for review in

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whole or in part, the circuit denied seven out of eight of those petitioners' motions to stay removal in 2006; eight out of ten in 2007; and four out of five in 2008 (as of December 17). The only stay granted in 2008 in an ultimately successful petition for review was allowed "in light of the government's notice of non-opposition." *Jivan* v. *Attorney General*, No. 07-13379, 2008 U.S. App. LEXIS 20828 (11th Cir. Sept. 19, 2008) (stay granted Feb. 4, 2008).

Indeed, stays were even denied in cases where the Eleventh Circuit eventually found clear errors of law. *See, e.g.*, *Beldorati* v. *Attorney General*, 228 F. App'x 952, 954 (11th Cir. 2007) (per curiam) (stay denied Jan. 9, 2007) (BIA and Immigration Judge (IJ) failed to consider whether petitioner had suffered past persecution); *Saliaj* v. *Attorney General*, 242 F. App'x 642, 644 (11th Cir. 2007) (per curiam) (stay denied Sept. 14, 2006) (same); *see also* *Toska* v. *Attorney General*, 194 F. App'x 767, 768-770 (11th Cir. 2006) (per curiam), *In re Toska*, No. A77-253-077 *et seq.*, at 2, 4 (EOIR June 9, 2008) (after a stay was denied, granting petition for review after finding that BIA had failed to consider relevant evidence in support of petitioner's claim of past persecution in Albania, eventually resulting in grant of asylum on remand); *Alzate-Zuleta* v. *Attorney General*, 238 F. App'x 472, 475-477 (11th Cir. 2007) (stay denied Oct. 26, 2006) (after stay was denied and petitioner was removed, holding that IJ erred in finding no past persecution where Colombian petitioner had received multiple death threats from the FARC, culminating in attempted murder by FARC gunmen, and the FARC overtly made reference to the petitioner's political activities). In fact, in 2006, the Eleventh Circuit denied a stay in a case where the government itself later moved to remand, effectively conceding that the BIA and IJ had erred. *See* *Camara* v. *Attorney General*, No. 06-13879 (11th Cir. 2006) (stay denied Sept. 7, 2006; government's motion to remand Nov. 20, 2006).

Applicants for asylum, in particular, would find it very difficult to secure a stay under the § 1252(f)(2) standard, given that they often seek judicial review of a discretionary decision of the Attorney General (as Congress has expressly authorized, *see supra* pp. 6-7), and their challenges often hinge on whether the BIA's order is supported by substantial evidence rather than on clear-cut questions of law. *See* 8 U.S.C. § 1158(b) ("The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who [meets the requirements for refugee status under 8 U.S.C. § 1101(a)(42)(A)]"); *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 162 n.11 (1993) ("A 'refugee' as defined in 8 U.S.C. § 1101(a)(42)(A), is entitled to apply for a discretionary grant of asylum pursuant to 8 U.S.C. § 1158."). Yet it is not at all unusual for the courts of appeals to reverse the BIA's denial of asylum based on serious errors in the administrative proceedings—even if those errors do not amount to mistakes that would likely satisfy the § 1252(f)(2) standard.[8]

Similarly, a petitioner who raised legal issues that were matters of first impression or close questions could likewise be unable to show by "clear and convincing evidence" that removal was prohibited as a matter of law, even if the court believed that the petitioner was likely ultimately to prevail on the merits of his claim. *See Andreiu*, 253 F.3d at 482 (observing that applying § 1252(f)(2) "would effectively require the automatic deportation of large numbers of people with meritorious claims, including every applicant who presented a case of first impression").

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[8] *See, e.g., Yang* v. *Mukasey*, 274 F. App'x 62 (2d Cir. 2008) (BIA failed to provide sufficient analysis of evidence); *Agbor* v. *Gonzales*, 487 F.3d 499 (7th Cir. 2007) (BIA gave insufficient weight to evidence); *Pavlova* v. *INS*, 441 F.3d 82 (2d Cir. 2006) (BIA's adverse credibility determination based on erroneous reading of record); *Ahmadshah* v. *Ashcroft*, 396 F.3d 917 (8th Cir. 2005) (BIA failed to consider key evidence); *Bella* v. *Gonzales*, 157 F. App'x 522 (3d Cir. 2005) (BIA's decision contrary to substantial evidence); *Melkonian* v. *Ashcroft*, 320 F.3d 1061 (9th Cir. 2003) (same).

Given this heightened standard, if § 1252(f)(2) is applied to stay applications, it is inevitable that petitioners with meritorious challenges—of which there are many—will be denied stays. Judge Posner has observed that the Seventh Circuit had "reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review ... on the merits" over the prior year. *Benslimane* v. *Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005). Although the BIA's reversal rate may vary from circuit to circuit and from year to year, hundreds of meritorious petitions for review make their way to the courts of appeal every year. *See, e.g.*, Ramji-Nogales et al., 60 Stan. L. Rev. at 362. Under § 1252(f)(2)'s standard, it would be much more difficult for these petitioners to secure a stay prior to judicial review of their cases, even where their cases ultimately prove meritorious.[9]

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[9] A holding that § 1252(f)(2) applies to aliens' motions for stays of removal pending review would make it a highly anomalous provision in federal law because it would impose a heightened standard to a request for preliminary (and temporary) relief. The few circumstances in which courts do apply a heightened standard even to motions for a preliminary injunction are inapplicable here, and the differences are instructive. Federal courts generally apply such a heightened standard where (1) the requested injunction would alter the status quo; (2) a mandatory preliminary injunction is sought; or (3) the injunction would award the movant all the re-

C. Numerous Cases Demonstrate The Dangers Of Applying § 1252(f)(2) To Motions For Stay Of Final Removal Orders

The federal reporters are replete with examples of petitioners who successfully contested BIA rulings and who would likely have suffered severe harm had they been forced to leave the country before their petitions for review were adjudicated. This risk would be especially high for petitioners of all sorts whose cases raise difficult or novel legal questions, and for asylum applicants who argue that the BIA ignored the weight of the evidence.

1. Cases raising issues of first impression or close legal questions

Petitioners whose cases raise issues of first impression, or otherwise complex questions of law, would find it especially hard to establish by "clear and convincing evidence" that removal is legally prohibited. Thus, even if such a case appeared legally meritorious and there were a clear risk the petitioner would be in dan-

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lief he ultimately seeks and that relief cannot be undone even if the defendant prevails on trial on the merits. *See, e.g.*, *O Centro Espirita Beneficiente Uniao Do Vegetal* v. *Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), *aff'd*, 546 U.S. 418 (2006); *Tom Doherty Assocs., Inc.* v. *Saban Entm't, Inc.*, 60 F.3d 27, 33-34 (2d Cir. 1995). By contrast, in cases where the government opposes a stay pending review of an alien's challenge of a removal order; (1) it is the *government* that seeks to upset the status quo—*i.e.*, to remove an alien who is currently in the United States; (2) the requested stay would not mandate any actions by the government but rather would simply prohibit them temporarily; and (3) the stay would not grant total relief to the petitioner but only a temporary reprieve pending review, which would be undone if the government prevailed.

ger if removed, a court applying § 1252(f)(2) might still be compelled to deny the stay.

For example, in 2003, Bernard Lukwago, a native of Uganda, argued in his petition for review to the Third Circuit that, as a former child soldier, he would face near-certain death if he were removed to Uganda. *See Lukwago* v. *Ashcroft*, 329 F.3d 157 (3d Cir. 2003). The Third Circuit stayed Lukwago's deportation before ruling for him on the merits. *See id.* (stay granted Aug. 9, 2002). According to the record, Lukwago had been abducted at age fifteen by the Lord's Resistance Army (LRA) after witnessing the murder of his parents; during his four months of captivity, the LRA had forced him to fight government troops, loot the corpses of soldiers, watch the mutilation of civilians and executions of disobedient child soldiers, and participate in the killing of his friend Joseph. *Lukwago*, 329 F.3d at 164. Child soldiers who tried to escape the LRA were executed. *Id.* at 179; *see also, e.g.*, Donnelly, *Africa and Its Children*, Boston Globe, Nov. 21, 2004, at A1 (describing abuse and trauma of twelve-year-old boy abducted by the LRA and the LRA's execution of children who tried to escape). If returned to Uganda, Lukwago feared he would be tracked down and killed by the LRA.

However, before granting Lukwago's petition for review, the Third Circuit first had to determine whether "former child soldiers who have escaped LRA enslavement" could be considered a "particular social group" under 8 C.F.R. § 208.13(b)(1)—a term whose "contours," the court recognized, "are difficult to discern" and to which other courts of appeals had applied "varied ... interpretations." *Lukwago*, 329 F.3d at 170-171. The court also had to address whether the substantial weight of the evidence supported a finding of an objectively reasonable fear of future persecution, contrary to the BIA's ruling. *Id.* at 179-180. It was thus by no means obvious that the BIA had committed a "clear-cut error[] of established law," *Weng*, 287 F.3d at 1340, yet the risk of irreparable harm had Lukwago been forcibly repatriated to Uganda was inarguably high.

The Second Circuit's decision in *Lin* v. *Department of Justice*, 459 F.3d 255 (2d Cir. 2006), further illustrates the danger that petitioners with meritorious claims will not be able to get a stay under § 1252(f)(2) if their case raises close or difficult legal issues. *Lin* involved the case of a man whom the Chinese government had imprisoned for five years under forced labor and reeducation for supporting the Tiananmen Square protests. *Id.* at 259. Lin's case hinged on whether the BIA's interpretation of 8 C.F.R. § 208.6, a confidentiality regulation limiting disclosure of information in asylum applications, was contrary to the plain language of the regulation and did not merit deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997). The court concluded that *Auer* deference was not appropriate and that the BIA had wrongly interpreted § 208.6. *See Lin*, 459 F.3d at 262, 264. But, faced with an agency's interpretation of its own regulation and without any prior determinative ruling by the courts, a circuit applying § 1252(f)(2) to Lin's motion to stay would have been hard-pressed to find by "clear and convincing evidence" that Lin's removal was prohibited as a matter of law. A stay was vital in Lin's case, however, as the Second Circuit concluded that once the Chinese government could infer that Lin was seeking political asylum in the United States, his risk of imprisonment and abuse upon his return to China increased significantly. *Id.* at 268.

Similarly, the Ninth Circuit granted Marta Said Ahmed, an applicant for adjustment of status, a temporary stay before ruling that the BIA erred by giving dispositive weight to the Department of Homeland Security's (DHS) opposition to her motion to reopen. *Ahmed* v. *Mukasey*, 548 F.3d 768, 2008 WL 4925056, at *4 (9th Cir. Nov. 19, 2008) (stay granted May 4, 2004). In so ruling, the court addressed an issue of "first impression" in the circuit that had already split three other courts of appeals: whether DHS has the authority "to block unilaterally a motion to reopen." *Id.* at *3. Ahmed would thus likely not have received a stay under § 1252(f)(2) even though her marriage was bona fide (her I-130 petition had been granted), her son was still an infant, and her petition was ultimately successful. *See id.* at *2, 5.[10]

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[10] The Third Circuit case of Jose Borges also turned on a question of "first impression" in that circuit: whether the 180-day time limit for moving to reopen a removal order issued in absentia is subject to equitable tolling. *See Borges* v. *Gonzales*, 402 F.3d 398, 400 (3d Cir. 2005). Borges—who was under removal proceedings for overstaying a visa and had applied for adjustment of status—suffered from egregiously inadequate representation, which resulted in DHS seizing and detaining Borges for more than a year, even though he had married a U.S. citizen six years earlier and was eligible for relief. *Id.* at 401-403, 409. The Third Circuit issued Borges a stay of removal and eventually granted his petition for review, encouraging DHS to release him during the pendency of his proceedings. *Id.* at 404, 409. As unfortunate as Borges' case was, it would have been even more so had the Third Circuit been required to apply § 1252(f)(2) to his motion to stay his final removal order: the court likely could not have determined there was clear and convincing evidence that the order was prohibited as a matter of law where the matter was one of first impression; Borges' detention made his deportation imminent; and once he was deported, he would no longer have been able to pursue an adjust-

Finally, in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court decided a legal issue on which there had been substantial difference of opinion: whether the repeal of relief under former Section 212(c) of the INA, 8 U.S.C. § 1182(c), applied retroactively, so as to render St. Cyr ineligible for a waiver of deportation that previously would have been available to him. Had St. Cyr, a lawful permanent resident, not been granted a stay pending judicial review of his case, he would have been removed to Haiti, which routinely imprisons deportees with any criminal record in horrific conditions. *See, e.g.*, *Pierre* v. *Attorney General*, 528 F.3d 180 (3d Cir. 2008) (recognizing inhumane conditions in Haitian prisons); *Auguste* v. *Ridge*, 395 F.3d 123, 129 (3d Cir. 2005) (describing temperatures of 105 degrees, and other "slave ship" like conditions). After prevailing in the Supreme Court, St. Cyr also prevailed on remand. *See* Morawetz, *INS* v. *St. Cyr: The Campaign to Preserve Court Review and Stop Retroactive Application of Deportation Laws*, in D.A. Martin & P.H. Schuck, *Immigration Stories* 306 (2005). But it is highly unlikely that St. Cyr could have obtained a stay of removal under the § 1252(f)(2) standard, given the division of authority on the legal question in the lower courts and the then-

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ment of status based on his marriage, *Ceta* v. *Mukasey*, 535 F.3d 639, 646 (7th Cir. 2008). *See also Morales-Morales* v. *Ashcroft*, 384 F.3d 418, 421-423, 428 (7th Cir. 2004) (stay granted Nov. 13, 2003) (after granting stay and deciding jurisdictional issue of first impression in the circuit, remanding for reconsideration of Morales' eligibility for cancellation of removal, where she had entered the United States eighteen years earlier, was married to a lawful permanent resident, and had four young children who were U.S. citizens, and the IJ himself had stated that "'the respondent in this case will most likely be able to meet the exceptional and extremely unusual hardship factors' for cancellation of removal").

absence of any controlling decision in this Court on that question.

Moreover, as explained below, it is exceptionally difficult for petitioners who are removed to pursue their cases in the courts. Thus, application of § 1252(f)(2) to stays pending judicial review could not only work serious harm to petitioners with meritorious claims but could also prevent this Court and the courts of appeals from clarifying important principles of immigration law.

2. Cases alleging inadequate consideration of the evidence

In addition, asylum petitioners who argue that the BIA did not give adequate consideration to evidence of persecution would find it extremely difficult to show by "clear and convincing evidence" at the preliminary stay stage that removal is barred as a matter of law.

The case of Ahmad Ahmadshah, an Afghani Christian who feared execution for apostasy, a capital crime under Shari'a law, illustrates this problem. *See Ahmadshah* v. *Ashcroft*, 396 F.3d 917, 919 (8th Cir. 2005). Ahmadshah had been beaten and threatened when local militiamen found a Bible inscribed with the names of him and his sister; they killed his sister two days later. *Id.* The Eighth Circuit stayed Ahmadshah's deportation and later granted his petition for review, remanding to the agency because the Immigration Judge (IJ) and BIA had not considered Ahmadshah's evidence that apostates are still subject to the death penalty in Afghanistan. *Id.* at 921; *see also id.* (stay granted Mar. 3, 2004). Again, the risks of irreparable harm were high—they could be no higher—and again, the Eighth Circuit's disapproval of the agency's failure to adequately consider material evidence in the record would likely not have constituted the "clear and convincing evidence" that removal was prohibited under § 1252(f)(2).[11]

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[11] *See also, e.g., Bella* v. *Gonzales*, 157 F. App'x 522, 523 (3d Cir. 2005) (stay granted Dec. 22, 2004) (granting stay and granting petition for review by Liberian who opposed Charles Taylor's ruling regime, had been tortured for his political views, and whose uncle, brother, and two cousins had all been murdered by Taylor's government, before ruling on the merits that substantial evidence did not support IJ's denial of asylum); *Mulanga* v. *Ashcroft*, 349 F.3d 123, 126-127, 131 (3d Cir. 2003) (stay granted Sept. 17, 2002) (granting stay and granting petition for review where the IJ's decision was not supported by substantial evidence; evidence instead suggested past persecution and well-founded fear of future persecution where Mulanga had been detained and beaten by authorities searching for her husband, a political activist who had disappeared and was presumably dead, and where current reports indicated violent retaliation against those affiliated with the opposition); *Mekhael* v. *Mukasey*, 509 F.3d 326, 327-328 (7th Cir. 2007) (stay granted Sept. 25, 2007) (granting stay and vacating BIA order where BIA did not adequately consider evidence of changed conditions—the war between Israel and Hezbollah—submitted by Lebanese Christian who had served in military group supported by Israel); *Gebreeyesus* v. *Gonzales*, 482 F.3d 952, 956 (7th Cir. 2007) (stay granted May 24, 2006) (granting stay and remanding for reconsideration of motion to reopen in light of new evidence, even though that evidence was not clear-cut, where Ethiopian who had been imprisoned for political activities and had continued political work in the United States had recently learned that her family's house in Ethiopia was under surveillance and that her brother had been arrested); *Diallo* v. *Gonzales*, 175 F. App'x 74, 76 (7th Cir. 2006) (stay granted Mar. 10, 2005) (granting stay and granting petition for review where BIA did not adequately consider evidence suggesting imminent violence against members of the political opposition like Diallo, who had already been imprisoned, raped, and beaten with an electrical cord for her political activities); *Melkonian* v. *Ashcroft*, 320 F.3d 1061, 1072 (9th Cir. 2003) (stay granted Oct. 19, 2001) (granting stay and remanding to BIA because substantial evidence showed that Armenian Christian from

Aliens who are escaping from China's policy of forced sterilization would face a similar risk under § 1252(f)(2), as premature deportation could result in irreparable injury to both men and women who have had multiple children. In many of those cases in which it has granted a stay of a removal order and remanded to the BIA, the Second Circuit has strongly criticized the agency's inadequate consideration of the evidence without finding outright that removing the petitioner from the country would be prohibited as a matter of law. *See, e.g.*, *Liu* v. *Mukasey*, 276 F. App'x 93 (2d Cir. 2008) (remanding motion to reopen where BIA ignored documents suggesting Liu's wife would be sterilized and the entire family detained upon return); *Yang* v. *Mukasey*, 274 F. App'x 62 (2d Cir. 2008) (remanding motion to reopen where BIA did not provide sufficient analysis of affidavit of Yang's father, which stated officials knew Yang had two U.S.-born children and planned to sterilize him once he returned to China); *Lui* v. *BIA*, 237 F. App'x 647 (2d Cir. 2007) (remanding motion to reopen where BIA did not comment on letter from town committee acknowledging Lui's four children and stating he would be sterilized upon return). In cases like these, a stay under § 1252(f)(2) would have been unlikely regardless of how blatant the BIA's failure to consider key evidence because the court of appeals did not explicitly find that consideration of that

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Abkhazia had objectively reasonable fear of future persecution based on his religion, ethnicity, and pro-Georgian political views); *Pavlova* v. *INS*, 441 F.3d 82, 84 (2d Cir. 2006) (granting petition by Russian Baptist who had been beaten and raped by Russian nationalists who had also killed four of her religious brethren, and vacating BIA order because BIA had based its adverse credibility determination on an erroneous reading of the record).

evidence would have forced the conclusion that removal of the petitioner would be prohibited as a matter of law. Indeed, since it began applying § 1252(f)(2) to motions for stay of removal, the Eleventh Circuit has repeatedly denied stays to petitioners who had applied for asylum based on China's forced sterilization policy, even in cases where it eventually granted the petitions for review because the BIA had abused its discretion by failing to consider material evidence. *See, e.g.*, *Li* v. *Attorney General*, 488 F.3d 1371, 1377 (11th Cir. 2007) (stay denied Oct. 20, 2006); *Cuiyan Zhu* v. *Attorney General*, 170 F. App'x 613, 617 (11th Cir. 2006) (stay denied June 28, 2005); *Shao Yu Yuan* v. *Attorney General*, No. 07-15781, 2008 WL 4164824, at *4 (11th Cir. Sept. 11, 2008) (per curiam) (stay denied Feb. 12, 2008).

Under § 1252(f)(2), stays of removal for women fearing that they or their daughters will be forced to suffer female genital mutilation (FGM) if deported would also be at risk. FGM is a "horrifically brutal procedure" that can lead to serious infection, hemorrhage, infertility, stillbirths, and death. *Nwaokolo* v. *INS*, 314 F.3d 303, 308-309 (7th Cir. 2002) (per curiam). In *Nwaokolo*, the Seventh Circuit granted a stay of deportation because of the "obvious[ly] "sever[e]" risk of irreparable harm (genital mutilation) to Nwaokolo and her two daughters if they were returned to Nigeria and because it was "arguable" that the BIA had abused its discretion by giving inadequate weight to Nwaokolo's evidence. *Id.* at 308, 310. Had the court been precluded from considering the likelihood of irreparable injury to the petitioner, it likely would likely not have been able to grant a stay under § 1252(f)(2).[12]

II. APPLYING § 1252(f)(2) TO MOTIONS FOR STAY OF FINAL REMOVAL ORDERS WOULD ESCALATE THE PROCEDURAL DIFFICULTIES PETITIONERS FACE

As the First Circuit has observed, applying § 1252(f)(2) to stays of deportation would effectively require a petitioner to persuade the court of appeals, at a very preliminary stage, that he will prevail at the end of the case, and to do so under an even higher standard than that applied to the merits. *See Arevalo*, 344 F.3d at 8. The difficulty of making such a showing is considerably enhanced by several procedural obstacles that petitioners face when challenging a removal order, including the need to move for a stay early in the process of judicial review, the lack of legal representation for many petitioners at that stage of the case, and the absence of access to a full administrative record. Although petitioners would face these obstacles under any standard, the application of § 1252(f)(2)'s standard would make them considerably more arduous.

Further, if a stay is denied in a meritorious case and the alien is removed, it is exceedingly difficult for the alien to return to this country even if he eventually succeeds in overturning the BIA's decision from abroad. Given the absence of any formal mechanism for allowing successful petitioners back into the United States after prevailing against an unlawful removal order, applying the § 1252(f)(2) standard would be clearly contrary to Congress's intent that petitioners with meritorious challenges to their removal order have meaningful judicial review.

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[12] Similarly, in *Agbor* v. *Gonzales*, 487 F.3d 499 (7th Cir. 2007) (stay granted Apr. 28, 2006), the Seventh Circuit granted a stay of deportation before granting Irene Arrey Agbor's petition for review. Agbor had fled Cameroon with her husband after her mother repeatedly threatened to poison her if she did not undergo FGM, and she feared either death or forced mutilation should she be repatriated. *Id.* at 501, 505. The Seventh Circuit found that the BIA's decision was "not supported by substantial evidence," *id.* at 504, grounds that might not have allowed Agbor to secure a stay if § 1252(f)(2)'s standard had been applied.

A. Because A Petitioner May Be Removed At Any Time, There Is Often Little Advance Warning Before A Stay Must Be Sought

An alien under a final order of removal can face severe time constraints in any effort to seek judicial review of the agency's decision. Under 8 U.S.C. § 1252(b)(3)(B)—and in contrast to prior law—an order of removal is not automatically stayed when an alien files a petition for review with the appropriate United States Court of Appeals. Rather, if an alien does not move for and receive a stay of removal, he is "subject to removal at any time after the entry of the removal order." *Patel* v. *Ashcroft*, 378 F.3d 610, 611 (7th Cir. 2004); *see also Weng*, 287 F.3d at 1337.

The rules governing BIA proceedings do not include a provision comparable to Fed. R. Civ. P. 62(a), under which, in most cases, execution of a judgment of a U.S. district court is automatically stayed for ten days following the entry of the court's order. Rather, under the INA, if an alien appeals an IJ's order of removal to the BIA, that order becomes final—and immediately executable—when the BIA affirms it. *See* 8 U.S.C. § 1101(a)(47)(B)(i); 8 C.F.R. § 1003.1(f); *Obale* v. *Attorney General*, 453 F.3d 151, 160 (3d Cir. 2006); BIA Practice Manual § 1.4(d), *available at* http://www.usdoj.

gov/eoir/bia/qapracmanual/BIA_Practice_Man_FullVer.pdf (last visited Dec. 23, 2008) ("An order [of the BIA] is deemed effective as of its issuance date, unless the order provides otherwise.").

Nor does the BIA itself normally have the authority to stay the execution of a removal order after it has affirmed such an order. Although an IJ's order of removal is stayed pending appeal to the BIA, 8 C.F.R. § 1003.6, and the BIA may stay removal orders when a motion to reopen or reconsider is pending before it, *id.* §§ 1003.2(f), 1003.23(b)(1)(v), there is no general authority for the BIA to stay administratively its own final orders pending judicial review in federal courts. *See* BIA Practice Manual § 6.3(a) ("The Board entertains stays only when an appeal, a motion to reopen, or a motion to reconsider is pending before the Board."); *id.* § 6.3(e) ("A discretionary stay of removal, deportation, or exclusion expires when the Board renders a final decision in the case."); *Alimi* v. *Ashcroft*, 391 F.3d 888, 893 (7th Cir. 2004) ("BIA does not entertain applications for stay" pending judicial review).

Because of the immediacy of the risk of removal, petitioners must often request a stay from the court of appeals at an early point in the process, sometimes even immediately upon filing the federal appeal. Requiring a petitioner to prove by "clear and convincing evidence" that his removal is legally prohibited under § 1252(f)(2) would make such efforts even more difficult.

B. Many Aliens Must Seek A Stay Of Removal Without The Assistance Of Counsel

The difficulties petitioners would face in securing a stay under § 1252(f)(2) are compounded by the fact that they often have no attorney representing them in the preliminary stages of judicial review—in part because many lawyers who appear before immigration judges and the BIA do not practice in the courts of appeals. Applying the § 1252(f)(2) standard to stay motions would thus require aliens to carry the heaviest burden when they are least likely to have the assistance of counsel.[13]

Sixty-five percent of aliens whose administrative proceedings were completed in 2005 were unrepresented. *See* Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3, 20 (2008). Of those who petition for review in the courts of appeals, a significant number continue pro se. In 2007, the petitioners in approximately twenty-six percent of all appeals from administrative agencies to the federal appellate courts were pro se at filing, and almost all of those pro se filings were appeals from the BIA. *See* Statistics Division, Office of Judges Program, Administrative Office of the U.S. Courts, *Judicial Business of the United States: 2007 Annual Report of the Director* 131 tbl. B-9, *available at* http://www.uscourts.gov/judbus2007/JudicialBusinespdfversion.pdf (last visited Dec. 23, 2008).[14]

Further, even where there are programs to link potentially meritorious pro se petitioners to counsel—for example under the Ninth Circuit's Pro Bono Program—the process of matching attorneys to these cases is time-consuming, and delay between the date of the agency's final order and appointment of counsel is virtually inevitable.[15] While the courts of appeals may appoint counsel in certain pro se cases, they usually will not do so at the preliminary stage when the petitioner would normally have to file a motion to stay removal. *See, e.g.*, *Obasohan* v. *Attorney General*, 479 F.3d 785 (11th Cir. 2007) (court appointed counsel to represent petitioner more than two months after his pro se motion to stay removal was denied; petitioner prevailed on the merits). Thus, in light of the time constraints facing an alien subject to a final order of removal, even a petitioner who may eventually secure counsel for the merits briefing of a petition for review may have to seek a stay without any representation.

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[13] The lack of legal representation for petitioners, many of whom have little knowledge of the legal system, have limited English skills, and may be detained, also precludes any negotiations with the government over delaying execution of a removal order until after the court of appeals has ruled on the petitioner's stay motion or on the merits.

[14] Eighty-nine percent of administrative appeals came from the BIA. *Id.* at 98 tbl. B-3.

In practice, this lack of representation, coupled with the speed at which a petitioner must seek a stay and other procedural hurdles, would likely render § 1252(f)(2)'s standard unworkable, or at least highly prejudicial to petitioners. It is too much to expect a pro se litigant facing such time pressure to prepare what is essentially a merits briefing with a heightened standard of proof on his own.

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[15] *See, e.g.*, United States Court of Appeals for the Ninth Circuit, *Handbook for the Pro Bono Program* 2-4 (May 5, 2006), *available at* http://www.ca9.uscourts.gov/ca9/probono.nsf (describing the screening process before pro bono counsel is appointed for pro se appellants and petitioners).

C. The Challenge Of Presenting A Case At The Preliminary Stay Stage Is Enhanced By The Lack Of An Administrative Record

The lack of an available administrative record at the preliminary stage where a petitioner must normally move for a stay would further prejudice petitioners who must satisfy § 1252(f)(2)'s standard. It would also frustrate courts' ability to evaluate motions under that standard.

Under Rule 17(a) of the Federal Rules of Appellate Procedure, the government has forty days after being served with an alien's petition for review to file the administrative record with the circuit clerk. In practice, the BIA often takes even longer to file the record. *See, e.g.*, Mushlin, *The Surge in Immigration Appeals and Its Impact on the Second Circuit Court of Appeals*, 60 The Record 243, 250 n.23 (2005) (observing that in the Second Circuit, "it ... can take months to receive the administrative record"); *see also* American Immigration Law Foundation, *Practice Advisory: How To File A Petition For Review* 10 (Oct. 25, 2006) (reviewing problems that arise when an agency files the administrative record late).[16]

Since an alien subject to a final order of removal may normally be removed at any time following the BIA's decision, this delay of forty days or more is potentially fatal to any attempt to prove by "clear and convincing evidence" that removal is prohibited as a matter of law. Although BIA rules permit a party to a proceeding to review the record on file with the Board, the party may not remove documents, and copying is limited. *See* BIA Practice Manual § 1.5(d)(i), (iii). Moreover, the Board's only office is in Virginia, and it is therefore impracticable for most petitioners (especially those who are detained) to travel there to review their case file. Even for those who can, the BIA typically does not keep files on-location once it has decided a case; rather, it sends them to an offsite storage facility. In addition, the BIA's Practice Manual instructs parties who seek to copy more than twenty-five pages of the record to consult the agency's Freedom of Information Act Unit, which effectively guarantees further delays. *Id.*

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[16] Indeed, in the present case, this Court did not receive the record from the Fourth Circuit until ten days *after* granting Mr. Nken a stay. *See* Docket, *Nken* v. *Mukasey*, No. 08-681 (Nov. 25, 2008 order granting stay; Dec. 5, 2008 entry indicating record received).

Petitioners' limited access to the administrative record is problematic under any standard,[17] but because the § 1252(f)(2) standard would require a stringent analysis of the merits of the underlying claim and does not account for equitable factors that may be more easily demonstrated without the benefit of a full record, the absence of a record will make it virtually impossible for many petitioners to obtain a stay of their removal orders. *See Andreiu*, 253 F.3d at 482 ("[Applying § 1252(f)(2)] would require full scale briefing at the beginning of the appellate process, often before the petitioner has even received a copy of the administrative record."); *see also Li* v. *Attorney General*, 488 F.3d 1371 (11th Cir. 2007) (certified administrative record filed a month after petitioner moved to stay removal and two weeks after court denied petitioner's motion to stay under § 1252(f)(2)). In particular, absent a full record, it would be extremely difficult for courts to properly evaluate stay motions under § 1252(f)(2) in cases where the petitioner argues that the IJ or BIA did not properly consider the record evidence. *See, e.g.*, *Agbor* v. *Gonzales*, 487 F.3d 499, 502-505 (7th Cir. 2007); *Yang*, 274 F. App'x at 63-64.[18]

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[17] *See, e.g., Lim* v. *Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004) ("Obviously, whenever possible, the petitioner [seeking a stay of removal] should file the administrative record, or relevant portions of it, to support any factual assertions.").

D. Pursuing A Petition For Review Is Extremely Difficult Once A Removal Order Has Been Executed

Applying § 1252(f)(2) to motions for stay of removal orders would dramatically increase the number of petitioners who are removed pending review of their cases in the courts of appeals, many of whom would be unable to return to the United States even if they successfully contest their removal orders. Although courts of appeals have jurisdiction to review removal orders even after petitioners have been removed from the country,[19] in practice it is extremely difficult for an alien to return once he has been deported, even if his petition for review has been successful. There is no class of visa or other formal reentry mechanism available to aliens who have been previously removed but have successfully challenged their removal orders. *See, e.g.*, American Immigration Law Foundation, *Practice Advisory: Return to the United States after Prevailing on a Petition For Review* 1 (Jan. 17, 2007). As a result, trying to obtain travel documentation that will permit a returning alien to reenter the United States can be onerous, extraordinarily time-consuming, and often entirely improvisatory. Furthermore, the cost associated with return travel and documentation (including the nearly indispensable assistance of counsel in such a difficult endeavor) may be so burdensome that it effectively precludes the petitioner from returning at all. *See id.* at 4. Thus, even an alien who wins his or her case may still be kept out of the country.

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[18] In some cases, even when the administrative record arrives, it may be too limited to permit the kind of searching review the § 1252(f)(2) standard would demand. *See Arevalo*, 344 F.3d at 8 n.5 ("The anomaly [of the clear and convincing evidence standard] is magnified when one considers the barebones administrative record from which appellate judges must work in deportation cases.").

[19] *See, e.g.*, *Zazueta-Carrillo* v. *Ashcroft*, 322 F.3d 1166, 1171 (9th Cir. 2003) (observing that, since the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, "[w]e now may entertain a petition after the alien has departed"); *see also* IIRIRA, Pub L. No. 104-208, § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. § 1105a(c) (1994)).

The extraordinary difficulty of returning successful petitioners back into the United States once they have been removed underscores the importance of allowing petitioners with potentially meritorious cases to obtain judicial review of their cases before they are forced to leave. This need is especially significant for petitioners who face serious hardships or danger if they are removed, even temporarily, to their countries of origin. For such people, the denial of a stay motion effectively denies them the opportunity for meaningful judicial review altogether.

CONCLUSION

The Court should maintain its November 25, 2008 stay of Mr. Nken's final order of removal or, alternatively, should vacate the Fourth Circuit's denial of Mr. Nken's motion for stay and remand with instructions to reconsider his motion under the traditional stay standard.

Respectfully submitted.

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DECEMBER 2008

APPENDIX

LIST OF AMICI CURIAE

The American Immigration Lawyers Association (AILA) is a national association with approximately 11,000 members throughout the United States, Canada, and Europe, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

Catholic Legal Services, Archdiocese of Miami, Inc. (CLS) is a non-profit agency dedicated to serving the immigration needs of South Florida's immigrant and refugee communities. CLS is a nationally recognized, BIA-accredited organization providing professional immigration services and attorney representation before the various governmental agencies including the Department of Homeland Security, the Immigration Courts, and the Board of Immigration Appeals. Over 1000 individuals seek the services of CLS each month: individuals seeking to reunite with their families; political and religious refugees seeking safety and security; essential religious workers seeking to minister to U.S. religious communities; battered spouses and their children. Catholic Legal Services attempts to meet their needs with a staff of nine full-time lawyers and thirty experienced immigration professionals, serving four locations in Miami-Dade and Broward counties, as well as the two major regional detention facilities.

The Florida Immigrant Advocacy Center (FIAC), a non-profit law firm, was founded in 1996 when federal funding restrictions limited Legal Services' ability to handle immigration cases on behalf of indigent clients. FIAC's mission is to protect and promote the basic human rights of immigrants of all nationalities. FIAC serves the most vulnerable immigrant populations through direct services, federal court litigation, impact advocacy, and education. For more than twelve years, FIAC attorneys have represented individual clients in removal proceedings before immigration judges, the Board of Immigration Appeals, and the U.S. Court of Appeals for the Eleventh Circuit.

Since its founding in 1881, the central mission of the Hebrew Immigrant Aid Society (HIAS) has been to rescue Jews and others fleeing persecution and to assist them to start their lives anew in peace and security in the United States and elsewhere. In fulfillment of this mission, HIAS maintained staff at Ellis Island to assist individuals through the immigration process, including representation in exclusion proceedings. More recently, HIAS attorneys and accredited representatives have provided legal representation to asylum seekers in Immigration Courts in the New York area, including at immigration detention facilities. HIAS has successfully represented numerous asylum seekers throughout the appellate process, up to and including the Federal Courts of Appeal. Through this experience we have learned how difficult it can be for asylum seekers to present sufficient evidence for their claims to be adjudicated, and how often it is necessary to go through several levels of review before all evidence is presented and considered and a just decision is reached. Therefore, HIAS believes it is crucial that individuals fleeing persecution have the opportunity for full judicial review of their cases, including when necessary the ability to move for their cases to be reopened for further review when the evidence and circumstances warrant.

The National Immigrant Justice Center (NIJC), a program of the Heartland Alliance for Human Needs and Human Rights, is a non-profit organization accredited by the Board of Immigration Appeals to provide immigration assistance since 1980. NIJC promotes human rights and access to justice for immigrants, refugees, and asylum seekers through legal services, policy reform, impact litigation, and public education. NIJC provides legal education and representation to low-income immigrants, asylum seekers, and refugees, including survivors of domestic violence and victims of crimes, detained immigrant adults and children, and victims of human trafficking, as well as immigrant families and other non-citizens facing removal and family separation. In fiscal year 2008, NIJC provided legal services to more than 8,000 non-citizens. NIJC has three offices in metropolitan Chicago and a staff that includes licensed attorneys, BIA-accredited representatives and paralegals, as well as the support of over 1000 pro bono attorneys, making NIJC one of the most accessible, high-quality legal service providers in the United States.

The National Immigration Law Center (NILC) is a non-profit legal advocacy organization dedicated to advancing and promoting the rights of low-income immigrants and their family members. NILC conducts trainings, produces legal publications, and provides technical assistance to non-profit legal assistance organizations across the country concerning immigrants' rights. NILC also conducts litigation to promote the rights of low-income immigrants in the areas of immigration law, employment, and public benefits. A major concern of the organization is to ensure that the government treats immigrants with fairness and due process. NILC has a direct interest in the issues in this case.

Public Counsel is the largest pro bono public interest law firm in the world. Founded in 1970, it is dedicated to advancing equal justice under law by delivering free legal and social services to the most vulnerable members of our community, including abused and abandoned children, homeless families and veterans, senior citizens, victims of consumer fraud, and non-profit organizations serving low-income communities. Public Counsel's Immigrants' Rights project represents over 100 asylum seekers each year. In the last fifteen years, a significant number of its clients have successfully appealed decisions denying them asylum to the U.S. Court of Appeals for the Ninth Circuit.

World Relief is an international non-profit organization whose mission is to empower the local Church to serve the most vulnerable. In the United States, World Relief focuses on serving refugees, asylum seekers, asylees, victims of human trafficking, and other vulnerable immigrants. World Relief has over twenty offices in the United States that provide immigration legal services and whose staff include numerous attorneys and individuals accredited by the Board of Immigration Appeals. World Relief is active both in individual case representation and the development of sound refugee and immigration laws and policies.

AMICUS
CURIAE
BRIEF

④ No. 08-681

Supreme Court, U.S.
FILED
DEC 29 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

◆

JEAN MARC NKEN,

Petitioner,

—v.—

MICHAEL B. MUKASEY, ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTEREST OF *AMICI CURIAE*[1]

The question in this case is whether temporary stays of administrative removal orders pending court review are governed by 8 U.S.C. § 1252(f)(2), which provides that "no court shall enjoin the removal of any alien pursuant to a final order ... unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." This issue of statutory interpretation raises serious constitutional questions under the Suspension Clause, U.S. Const. art. I, § 9, cl. 2. *Amici curiae* are law professors with expertise in immigration law and/or federal jurisdiction and have particular knowledge about the statutory system for judicial review of administrative removal orders, the historical role of the writ of habeas corpus in that system, and the constitutional rights of non-citizens. *Amici* have a professional and scholarly interest in providing the Court with an understanding of the constitutional problems that would arise if Section 1252(f)(2) were interpreted to apply to temporary stays of removal pending judicial review of the removal order.

Among the *amici* are authors or co-authors of the following: T. Alexander Aleinikoff, David A.

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[1] Pursuant to Rule 37.3, letters of consent from the parties have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

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SUMMARY OF ARGUMENT

The current statutory scheme for judicial review of removal orders places jurisdiction in the court of appeals through the mechanism of petitions for review. Historically, however, review of deportation orders was obtained through habeas corpus petitions and this Court has held that the Suspension Clause guarantees review of deportation orders. Thus, as a statutory substitute for habeas review, the petition-for-review system must meet Suspension Clause standards, which require at a minimum the scope of review at the time of the Founding. The historical scope of the writ gave courts not just the technical ability to exercise jurisdiction over a petition, but also the actual power to grant effective relief. Such powers included the authority to issue orders controlling the custody of the petitioner.

Interpreting 8 U.S.C. § 1252(f)(2) to apply to stays of removal pending judicial review would impose impermissible obstacles to the ability of the federal courts to exercise jurisdiction and to grant effective relief in a great number of cases, including those in which the petitioner faces torture, incarceration or execution upon return to the receiving country. For such a petitioner who is unable to obtain a stay at the outset of the case under Section 1252(f)(2)'s exceedingly high standard, a court order ultimately vindicating his position on the merits will be rendered meaningless if the petitioner has already been delivered into a foreign prison, tortured or killed in the receiving country.

Under the Fourth Circuit's ruling, Section 1252(f)(2) improperly impedes the courts' power to issue temporary orders preserving their ability to grant effective relief on the merits. The statutory scheme for judicial review would thus fall below the minimum standards of the Suspension Clause. The doctrine of constitutional avoidance therefore provides an additional reason why the Court should interpret Section 1252(f)(2) not to apply to temporary stays of removal pending judicial review.

ARGUMENT

This case presents a critically important question about how a federal court of appeals reviews the immigration agency's administrative order removing an alien from the United States. By statute, an alien seeking judicial review of a removal order may seek a temporary stay of the order while the federal court of appeals decides whether the order is lawful. 8 U.S.C. § 1252(b)(3)(B). The question presented in this case is whether such stays of removal are governed by 8 U.S.C. § 1252(f)(2), which provides:

> Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

In contrast to the view of eight other circuits, the Fourth and Eleventh Circuits have held that this provision applies.

Several circuits have warned that if Section 1252(f)(2) applies to temporary stays of removal, a petitioner would face a higher burden to obtain a temporary stay at the very outset of the case than to win ultimate relief on the merits. In significant categories of cases, including those filed by aliens facing torture, imprisonment or execution upon return, the court's inability to issue a stay under the Section 1252(f)(2) standard would render any eventual ruling in favor of the petitioner ineffective or impossible. As set forth below, imposing such a standard would violate the Suspension Clause. The Court should avoid that constitutional problem by interpreting Section 1252(f)(2) not to apply to stays of removal pending judicial review. Because Congress has not prescribed any specific statutory standard for stays of removal pending judicial review, the courts of appeals should remain free to apply traditional standards for preliminary relief, like those adopted by eight circuits. Unlike Section 1252(f)(2), such equitable standards give courts the flexibility to address the circumstances of each case and thus generally comport with the Suspension Clause's requirement that courts must be able to issue temporary stays when needed to preserve the court's ultimate ability to grant effective relief on the merits.

I. THE SUSPENSION CLAUSE GUARANTEES JUDICIAL REVIEW OF REMOVAL ORDERS AND SUCH REVIEW NECESSARILY MUST INCLUDE THE POWER TO PROVIDE AN EFFECTIVE REMEDY

A. The Suspension Clause Guarantees Judicial Review of Removal Orders

It is well-settled that the Suspension Clause applies to the judicial review of the government's decisions to remove aliens from the United States. *See INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (noting that Suspension Clause requires "some 'judicial intervention in deportation cases'") (quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953)). Removal in itself, as well as physical detention preliminary to removal, involves placing an individual in government custody. Thus, historically removal orders have been reviewed by habeas corpus or a statutory substitute. *See St. Cyr*, 533 U.S. at 305-08 (setting forth history of judicial review of immigration decisions). The current statutory scheme provides for judicial review of a final removal order through a petition for review in the court of appeals. 8 U.S.C. § 1252(a)(5). The most recent amendment expanded the scope of review in the court of appeals while generally eliminating the alternative of district court habeas actions. REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(A)(iii), 199 Stat. 231, 310.[3] As a statutory substitute for habeas corpus review, the petition-for-review mechanism must be adequate and effective under constitutional standards. *See St. Cyr*, 533 U.S. at 300-05.

This Court has held that the Suspension Clause guarantees a minimum level of federal court review when, as in removal proceedings, the Executive Branch acts to deprive a person of his liberty. Most recently, in *Boumediene v. Bush*, __ U.S. __, 128 S. Ct. 2229 (2008), the Court considered whether the Constitution permits Congress to eliminate the habeas corpus jurisdiction of the federal courts to review Executive Branch decisions to detain persons as enemy combatants under the Military Commissions Act of 2006. *Boumediene* first reaffirmed that "'at the absolute minimum' the [Suspension] Clause protects the writ as it existed when the Constitution was drafted and ratified." *Id.* at 2248 (quoting *St. Cyr*, 533 U.S. at 301). That, the Court emphasized, included at least "a meaningful opportunity to demonstrate ... 'the erroneous application or interpretation' of relevant law." *Boumediene*, 128 S. Ct. at 2266 (quoting *St. Cyr*, 533 U.S. at 302). The Court then pointed out that the Framers were particularly concerned about the availability of court review when an individual is subject to executive detention. *Id.* at 2269. Based upon core separation-of-powers principles, *Boumediene* concluded that the Suspension Clause "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account." *Id.* at 2247 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973)).

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[3] Although the REAL ID Act of 2005 generally repealed habeas corpus review of removal orders and placed jurisdiction for such review in the courts of appeals, it did not eliminate all habeas corpus jurisdiction in the immigration context. For example, habeas corpus remains the vehicle for challenges to immigration detention. *See, e.g., Ferry v. Gonzales*, 457 F.3d 1117, 1131 (10th Cir. 2006) (observing that REAL ID Act "did not eliminate a district court's jurisdiction to review habeas petitions challenging an alien's detention."). *See also* H.R. Rep. No. 109-72, at 174, *reprinted in* 2005 U.S.C.C.A.N. 240, 300 (2005) (noting that REAL ID Act "would not preclude habeas review over challenges to detention that are independent of challenges to removal orders"). In addition, to the extent that any statutory scheme for review of removal orders does not provide an adequate and effective substitute for habeas corpus, the Suspension Clause would require that habeas review remain available.

B. To Meet the Minimum Requirements of the Suspension Clause, a Statutory Limitation on Judicial Review Cannot Interfere with the Courts' Ability To Grant Effective Relief

The Court's recent decision in *Boumediene* confirms that the Suspension Clause guarantees not just the right to go into court, but also the power of the court to provide effective relief. *Boumediene* held that the constitutionally guaranteed "privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held [unlawfully]," and also that "the habeas court must have the power to order the conditional release of an individual unlawfully detained…." 128 S. Ct. at 2266. For those constitutional rights to be effective in a habeas corpus proceeding or its equivalent, the court must have the authority to control the location of the prisoner. As set forth below, the Framers understood the court's power to control a petitioner's custody as an essential part of the writ. The Great Writ was implemented in U.S. courts accordingly. Depriving the courts of the power to stay removal in appropriate cases therefore would curtail the scope of the writ as it existed in 1789 and would violate the Suspension Clause. *See Boumediene*, 128 S. Ct. at 2248.

The scope of the Great Writ both before and after the time of the Framing reached not just the court's jurisdiction to rule upon the lawfulness of the petitioner's custody, but also the court's power to ensure effective relief by controlling the location of the petitioner. Making that power more effective was one of the reforms pursued by the Habeas Corpus Act of 1679, which Parliament passed in order to remedy a series of abuses that had impaired the effectiveness of the writ.[4] Those abuses included the Crown's efforts to evade the writ by transferring prisoners from custodian to custodian, removal of prisoners to places like Scotland where the writ did not run, and outright refusal to comply with the writ. In response to the first problem, Section 9 of the Act regulated the transfer of prisoners and placed it under judicial control, with enumerated exceptions.

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[4] Historians have debated which features of the 1679 act were novel, and which features codified reforms that the common law courts had already been developing. *See, e.g.*, Helen A. Nutting, *The Most Wholesome Law – The Habeas Corpus Act of 1679*, 65 Am. Hist. Rev. 527, 539-40 (1960). This distinction does not matter to the issues before the Court.

Sections 2 and 3 set strict time limits for the custodian to produce the prisoner in response to the writ, and simplified the procedure for punishing noncompliance by eliminating intermediate stages that had facilitated delay. Section 12 prohibited and severely punished removal of prisoners from England, again with enumerated exceptions. *See* 4 William Blackstone, *Commentaries* *135-137 (extolling the act as "another *magna carta*"); 9 W.S. Holdsworth, *A History of English Law* 116-18 (1926); R.J. Sharpe, *The Law of Habeas Corpus* 18-20 (2d ed. 1989); Dallin H. Oaks, *Habeas Corpus in the States*, 32 U. Chi. L. Rev. 243, 252-53 (1965).

Courts in England regularly exercised this power to control the custody of the prisoner during the pendency of habeas cases. Although the 1679 Act applied by its terms only in "criminal or supposed criminal matters," the English courts adopted analogous reforms of the common law writ over the course of the Eighteenth Century. Oaks, *supra* at 253; Sharpe, *supra* at 20. The resulting rules for controlling custody of the prisoner were summarized by Justice Samuel Nelson in his separate opinion in the extradition case, *In re Kaine*:

> [P]ending the examination or hearing, the prisoner, in all cases, on the return of the writ, is detained, not on the original warrant, but under the authority of the writ of *habeas corpus*. He may be bailed on the return *de die in diem*, or be remanded to the same jail whence he came, or to any other place of safe keeping under the control of the court, or officer issuing the writ, and by its order

> brought up from time to time, until the court or officer determines whether it is proper to discharge or remand him absolutely. . . . The efficacy of the original commitment is superseded by this writ while the proceedings under it are pending, and the safe keeping of the prisoner is entirely under the authority and direction of the court issuing it, or to which the return is made.

55 U.S. (14 How.) 103, 133-34 (1853) (Nelson, J., concurring in part and dissenting in part) (citing Matthew Bacon, *A New Abridgement of the Law* (originally published in 1732), and earlier English cases); *see also Barth v. Clise*, 79 U.S. (12 Wall.) 400, 402 (1871); *Johnston v. Marsh*, 227 F.2d 528, 530 (3d Cir. 1955); *Principe v. Ault*, 62 F. Supp. 279, 282 (N.D. Ohio 1945) (immigration case); Rollin C. Hurd, *A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus and the Practice Connected with It* 324 (1858); William S. Church, *A Treatise on the Writ of Habeas Corpus* 266-68 (2d ed. 1895). Thus, the scope of the writ at the time of the Framing encompassed a court's power to order the government to produce a prisoner, or to control the government's movement of the prisoner – not only in criminal cases, but in any case brought to the courts via habeas corpus.

In the United States, the courts continued to exercise control over the petitioner during the pendency of habeas cases by issuing orders to respondent custodians to ensure effective relief. In the Nineteenth Century, U.S. courts used attachments for contempt to compel the obedience of custodians who transferred detained persons in an effort to evade the writ. *See, e.g.*, *United States v. Davis*, 25 F. Cas. 775 (C.C.D.C. 1840) (Case No. 14,926) (holding custodian in contempt for removing alleged slaves from the District of Columbia to avoid writ for their freedom and then refusing to produce them when ordered to do so); *In re Hamilton*, 11 F. Cas. 319, 319 (S.D.N.Y. 1867) (Case No. 5,976) (discussing commitment of officer for contempt of the writ by transferring petitioner from Philadelphia to New York); *Ex parte Young*, 50 F. 526 (C.C.E.D. Tenn. 1892) (holding that a father was permissibly held in contempt for transferring his child out of state in order to avoid habeas); *United States v. Green*, 26 F. Cas. 30 (C.C.D.R.I. 1824) (No. 15,256) (Story, J.) (bypassing attachment where custodian was in court and could be compelled to testify); Hurd, *supra* at 240-42; *see also id.* at 237 ("In Maine, Massachusetts and Delaware, the concealing of the prisoner or changing his custody, with the intent to elude the service of the writ of habeas corpus, is prohibited under severe penalties . . . . In Indiana, Arkansas and Alabama, the act is declared a misdemeanor, and the offender subject to fine and imprisonment.").[5] Thus, U.S. courts exercising habeas corpus jurisdiction have consistently had the power not just to reach decisions on the lawfulness of detention, but also to take steps to ensure that their orders will be carried out by respondents.

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[5] Variations about whether the custodian's obligations are triggered only by *service* of the court's order, or even earlier by *notice* of the proceedings, are not relevant to the issues before the Court. *See, e.g.*, *United States ex rel. Nazaretian v. Tod*, 291 F. 665 (S.D.N.Y. 1923) (declining to hold immigration officer in contempt where the writ was not served until he had already transferred custody to the master of the vessel).

A similar concern about ensuring the ability of the court to provide effective relief underlies this Court's own Rule 36, which imposes limits on the transfer of a prisoner pending the Court's review of a decision on the prisoner's habeas corpus petition. That rule traces its lineage back to 1886, and was adopted in response to Congress's enactment of a right of appeal in habeas corpus proceedings. *See* Sup. Ct. R. 34 ("Custody of Prisoners on Habeas Corpus"), 117 U.S. 708 (1886); Act of Mar. 3, 1885, ch. 353, 23 Stat. 437.[6] The 1867 Habeas Corpus Act had already included an express provision staying all state proceedings pending this Court's review. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385-86; *see Barefoot v. Estelle,* 463 U.S. 880, 892-93 n.3 (1983). In short, since the Supreme Court acquired jurisdiction in appeal over habeas corpus proceedings, it has ensured its judicial authority to control the custody of the prisoner pending the appeal.

This authority of a habeas court to control the custody of a prisoner is no mere technical appendage to the historical writ, but an essential guarantee of its efficacy. Without the power to direct the disposition of the prisoner in appropriate cases, the court would often be unable to provide effective relief, or even to ensure that its jurisdiction is not vitiated by a *fait accompli.* This Court has recognized this principle consistently. For example, in *United States v. Shipp*, 203 U.S. 563 (1906), the Court considered a contempt proceeding brought after a sheriff permitted a lynch mob to murder a habeas petitioner who had obtained a stay of execution pending appeal. This Court rejected the sheriff's argument that the circuit court had no power to issue a stay unless it was first determined that the petitioner had been held in violation of the Constitution:

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[6] The 1885 act restored the avenue of appeal that the Reconstruction Congress had created in 1867 and then quickly repealed in 1868. *See Ex parte McCardle,* 74 U.S. (7 Wall.) 506 (1868).

> Until its judgment declining jurisdiction should be announced, [the Court] had authority, from the necessity of the case, to make orders to preserve the existing conditions and the subject of the petition, just as the state court was bound to refrain from further proceedings until the same time....The fact that the petitioner was entitled to argue his case shows what needs no proof, that the law contemplates the possibility of a decision either way, and therefore must provide for it.

Id. at 573. Similarly, in *Lonchar v. Thomas*, 517 U.S. 314, 319 (1996), the Court observed that the denial of a stay that is needed to prevent the death of the petitioner would be the effective equivalent of dismissing his petition and thus "denies the petitioner the protection of the Great Writ entirely, risking injury to an important interest in human liberty." *Id.* at 324.

Thus, a court reviewing a claim of unlawful executive detention – including a petition for review of an administrative removal order – must have the power to issue orders that will preserve the effectiveness of its decisions about the lawfulness of the detention.

II. APPLICATION OF 8 U.S.C. § 1252(f)(2) TO STAYS OF REMOVAL WOULD INTERFERE WITH THE COURTS' ABILITY TO GRANT EFFECTIVE RELIEF

In a significant number of cases, the application of the Section 1252(f)(2) standard would vitiate the court's ability to grant effective relief upon reaching the merits. In such cases, a court ruling for a petitioner who had failed to meet Section 1252(f)(2)'s exceedingly high bar would find that its decision was rendered meaningless, as the petitioner could no longer benefit from the court's order. As set forth above, denying the availability of an effective stay of removal is contrary to the common law history of the writ and therefore runs afoul of the Suspension Clause. There are several categories of immigration cases in which relief on the merits would be rendered meaningless without a stay of removal at the outset.

Aliens with Claims for Relief from Removal Based on Threats of Torture, Death, or Serious Forms of Persecution

For petitioners who seek relief from removal based on threats of torture, death or other serious forms of persecution, granting the writ after denying a stay would be no relief at all. An alien who seeks review of an administrative order denying his claim for asylum or for protection under the Convention Against Torture may not be able to demonstrate immediately upon filing a petition for review that there is clear and convincing evidence that the removal order "is prohibited as a matter of law," 8 U.S.C. § 1252(f)(2). And after his removal, even if he may continue to pursue his claim on the merits, he may well be tortured or killed. As Judge Easterbrook noted in *Hor v. Gonzales*:

> The ability to come back to the United States would not be worth much if the alien has been maimed or murdered in the interim. Yet under the Attorney General's reading of § 1252(f)(2) an alien who is likely to prevail in this court, and likely to face serious injury or death if removed, is not entitled to remain in this nation while the court resolves the dispute.

400 F.3d 482, 485 (7th Cir. 2005); *see also Tesfamichael v. Gonzales*, 411 F.3d 169, 175 (5th Cir. 2005); *Andreiu v. Ashcroft*, 253 F.3d 477, 484 (9th Cir. 2001) (en banc). In such a case, the court's eventual order in the petitioner's favor would be a dead letter because it would come too late to effect the relief requested.

Aliens Facing Incarceration by the Receiving Country

Similarly, in situations where the petitioner is incarcerated by the receiving government upon return, the court's subsequent order vacating the removal order will be ineffectual and meaningless. The U.S. court would at that point be powerless to compel the petitioner's release from the foreign prison, and the petitioner would be unable to return to the United States. Such incarceration may be wholly unrelated to any asylum or torture-based claim for relief. For example, it is well-documented that some nations routinely incarcerate persons who are deported from the United States. *See, e.g.*, *Lin v. U.S. Dep't of Justice*, 432 F.3d 156, 158 (2d Cir. 2005) (noting that U.S. State Department reports establish that many repatriated Chinese citizens have been subjected to administrative detention); *Auguste v. Ridge*, 395 F.3d 123, 129 (3d Cir. 2005) (noting that Haitian government systematically incarcerates returning deportees); Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 Stan. J. Civ. Rts. & Civ. Liberties 195, 219 (2007) (noting that the national police in El Salvador instituted program of detaining returning deportees).

Some petitioners may be incarcerated upon return because that is the goal of the removal proceedings. If, for example, an alien is specifically wanted for prosecution or punishment by the receiving country, U.S. government officials may be seeking removal for the acknowledged purpose of delivering the petitioner to foreign authorities for incarceration. *See, e.g.*, *INS v. Doherty*, 502 U.S. 314, 318-19 (1992) (U.S. government resumed deportation proceedings to accomplish return of petitioner to home country for imprisonment after U.S. court denied extradition on grounds that alleged crimes were political offenses); *Ruiz Massieu v. Reno*, 91 F.3d 416, 417-18 (3d Cir. 1996) (U.S. government initiated deportation proceeding against petitioner after U.S. courts denied multiple extradition requests for lack of probable cause).

For a petitioner who will be incarcerated upon his return to the country of nationality, the denial of a stay of removal makes it impossible for the court to grant effective relief on the merits if the removal order is overturned. If the U.S. court of appeals ultimately were to decide in the petitioner's favor on the merits, it would be too late; the petitioner would be imprisoned or perhaps executed and beyond the power of the United States courts to grant relief from removal.

Aliens Facing Threats of Torture or Death Unrelated to Claims of Relief from Removal

In addition, many aliens face threats of irreparable injury or torture unrelated to the nature of their claims against removal. For example, in some countries, government authorities or unchecked civilian or paramilitary groups routinely detain and torture returning deportees as a form of summary punishment. *See Auguste*, 395 F.3d at 129 (noting U.S. State Department reports that returning deportees incarcerated by the Haitian government have been beaten, tortured by electric shock, burned with cigarettes, and subjected to eardrum damage by severe boxing on the ears); Kanstroom, *supra*, at 219 (noting reports that in El Salvador and Honduras, many deportees are hunted down and murdered by vigilantes). Even when the threat of such torture is not the basis for challenging removal, a petitioner facing such threats may need a stay in order to realize the benefit of any ultimate court decision vacating the removal order. Absent a stay at the outset of the case, such a petitioner may be killed or suffer grave or irreparable injury before winning on the merits of his removal case.[7] As set forth in Part I *supra*, courts historically have had the power to prevent such harms from befalling a petitioner pending a final decision on the merits.

* * *

Several circuits have warned that the Fourth Circuit's application of Section 1252(f)(2) makes it more difficult to obtain a stay than to obtain final relief. *See Arevalo v. Ashcroft*, 344 F.3d 1, 8 (1st Cir. 2003) (stating that application of Section 1252(f)(2) as stay standard would require full deliberation on the merits at the outset of a case and impose a greater burden to obtain a stay than ultimate relief on the merits); *see also Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002); *Andreiu*, 253 F.3d at 482. Such a result would interfere with the courts' ability to grant effective relief for aliens who fall within the categories described above.

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[7] A petitioner may also encounter additional obstacles in attempting to return to the United States after winning on the merits. The Board of Immigration Appeals has suggested in dicta that an alien who has been removed from the United States is subject to the "nullification of legal status" and may find his re-entry into the United States barred under a ground of inadmissibility. *In re Armendarez-Mendez*, 24 I. & N. Dec. 646 (BIA 2008). Whether such bars to re-entry would apply to an alien who prevails on a petition for review is doubtful, but it is possible that the government may take such positions in future cases. That issue is not before the Court but underscores the multiple – and potentially evolving – consequences of departure that the federal court must be able to take into account in deciding whether to grant a stay pending its review of a removal order.

Amici do not contend that an automatic stay is required in order to avoid a Suspension Clause violation. For example, the equitable stay standards in eight circuits would permit the reviewing court to take into account the factors of irreparable harm and the likelihood of success on the merits without requiring an automatic stay. But Section 1252(f) as construed by the courts of appeals imposes a heightened and inflexible standard for temporary relief that is inconsistent with the core meaning and historical understanding of the Suspension Clause.[8]

III. THE COURT SHOULD INTERPRET SECTION 1252(f)(2) AS HAVING NO APPLICATION TO STAYS OF REMOVAL

If Section 1252(f)(2) imposes a standard that impedes the courts from issuing stays of removal that are necessary to ensure effective relief on the merits, then the statute is inconsistent with the Suspension Clause. The Court should avoid these constitutional problems by interpreting Section 1252(f)(2)'s operative phrase – "no court shall enjoin" – as not including temporary stays pending judicial review within the category of injunctions. *See St. Cyr*, 533 U.S. at 299-300 (holding that "when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result" and construing statute to avoid constitutional problem).

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[8] Thus, it would be an error to rely, as the Fourth and Eleventh Circuits have, upon § 306(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA"), to justify the application of Section 1252(f)(2) to temporary stays of removal pending court review. Although IIRIRA § 306(b) provides that the courts of appeals continue to have jurisdiction over petitions for review after the petitioner is removed, the Suspension Clause requires more than the ability to exercise jurisdiction as a technical matter. It guarantees a court the power to grant effective relief and to issue orders necessary to preserve that power.

Section 1252(f)(2) cannot reasonably be interpreted to apply selectively to some applications for stays, but not to others. The provision reads in its entirety:

> Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

The statute is indivisible. If this language applies to stays of removal at all, it applies to every case. Conversely, if Section 1252(f)(2) is construed not to apply to stays because of the Suspension Clause problems that would be present in some cases, then the same interpretation can and must govern all stay applications.

In *Clark v. Martinez*, 543 U.S. 371 (2005), this Court confronted a similar question of statutory construction, considering whether an immigration detention statute, 8 U.S.C. § 1231(a)(6), permitted the government to detain indefinitely an alien who had been put into deportation proceedings while seeking admission to the United States. Previously, the Court had held in *Zadvydas v. Davis*, 533 U.S. 678 (2001), that Section 1231(a)(6) did not authorize the indefinite detention of an alien who had been put into deportation proceedings after being admitted to the United States. *See Clark*, 543 U.S. at 377 (citing *Zadvydas*, 533 U.S. at 689, 699). The detention statute applied by its terms equally to both categories of aliens. *Clark* held that the operative language of the statute had to apply consistently to both categories of aliens, notwithstanding the government's argument that the two categories of aliens were differently situated and their detention implicated different constitutional concerns. *Clark*, 543 U.S. at 380. Justice Scalia, writing for the majority, explained that the process of interpretation was limited by the range of meanings that the statute could plausibly bear. "The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions *as a means of choosing between them*." *Id.* at 385. As a result, if one of two plausible interpretations "would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court." *Id.* at 380-81.

In the instant case, the verb "enjoin" in Section 1252(f)(2) can be construed as including "stay" or as not including "stay," but it cannot plausibly be "interpreted to do both at the same time." *See Clark*, 543 U.S. at 378. There is at least a serious constitutional question as to whether 8 U.S.C. § 1252(f)(2) can apply to stays of removal for asylum applicants and others whose meritorious claims cannot be remedied if they are removed while judicial review is still pending. Thus, the Court should construe the statute not to apply to stays.[9]

If Section 1252(f)(2) does not apply to stays of removal pending judicial review, no other subsection of 8 U.S.C. § 1252 appears to provide a specific statutory standard for such stays. The Suspension Clause requires that the courts have the power to ensure that the protections of the writ are fully and practically effectuated. While Congress might prescribe some standard for stays of removal without running afoul of the Suspension Clause, it may not impose a standard that would vitiate the writ by prohibiting courts from issuing a temporary stay when necessary to preserve the ability to grant relief on the merits. Nothing in the plain language of Section 1252 indicates that Congress intended to impose the severe Section 1252(f)(2) standard to temporary stays, and there is no reason to believe that Congress would intend the illogical and unconstitutional consequences of such a rule.

Although *amici* take no position on the precise standard that should be employed, we note that the normal stay standards prevailing in courts of appeals would permit a court the flexibility to decide in light of circumstances when a stay of removal is required to preserve the court's ability ultimately to grant relief on the merits. Moreover, such flexible standards are consistent with the principle that the Suspension Clause does not prevent the courts from "dispos[ing] quickly, efficiently and fairly of first habeas petitions that lack substantial merit, while preserving more extensive proceedings for those petitions raising serious questions." *Lonchar*, 517 U.S. at 325. Historical practice, as well as sound policy, countenance the threshold rejection of a habeas petition – and any accompanying application for a stay – that demonstrates its own lack of merit. *See* Hurd, *supra* at 222-24; *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830) (Marshall, C.J.) ("[T]he writ ought not to be awarded, if the court is satisfied that the prisoner would be remanded to prison."). But in cases that require more time for consideration, the Suspension Clause does demand that the courts have the authority to stop the custodian from placing the prisoner where the court will be powerless to provide effective relief.

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[9] *Amici* observe parenthetically that the language of Section 1252(f)(2) states that "[n]otwithstanding any other provision of law, no court shall enjoin the removal" of particular aliens, in contrast with 8 U.S.C. § 1252(f)(1), which limits the authority of any "court (other than the Supreme Court)." Thus, if Section 1252(f)(2) were to apply to stays of removal, it would also appear to apply to stays of removal granted by this Court.

CONCLUSION

Amici curiae respectfully urge the Court to reverse the decision of the Fourth Circuit and to hold that 8 U.S.C. § 1252(f)(2) does not apply to an application for a stay of removal pending decision on a petition for review.

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Dated: December 26, 2008

AMICUS
CURIAE
BRIEF

[illegible]

JAN 8 - 2009

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No. 08-681

IN THE

Supreme Court of the United States

JEAN MARC NKEN,
Petitioner,
v.

MICHAEL MUKASEY,
UNITED STATES ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Congress intended that an alien's motion to prevent removal pending consideration of a petition for review should be governed by the standard set forth in 8 U.S.C. § 1252(f)(2), or instead intended to permit each federal appeals court to apply its own standard.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to promoting America's security. To that end, WLF has appeared before this Court and other federal courts to support the prompt deportation of aliens who enter or remain in the United States in violation of our law, thereby ensuring that those aliens do not take immigration opportunities that might otherwise be extended to others. WLF has also opposed efforts by federal courts to exercise jurisdiction over immigration matters that are properly the prerogative of the elected branches of government. *See, e.g., Clark v. Martinez,* 543 U.S. 371 (2005); *Demore v. Kim*, 538 U.S. 510 (2003); *INS v. St. Cyr,* 533 U.S. 289 (2001); *Reno v. American-Arab Anti-Discrimination Comm.* ("*AAADC*"), 525 U.S. 471 (1999).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties consented to the filing of this brief; copies of the letters of consent have been lodged with the Court.

Particularly in light of the significant national security concerns raised by immigration matters, *amici* believe that the courts should afford considerable deference to the political branches of government regarding the timing of removal of aliens determined to be present in this country without authorization. *Amici* are concerned that courts are undermining the effectiveness of immigration enforcement efforts when they routinely block removal while they are reviewing final orders of removal. As evidenced by this case, the ready availability of such delays frequently permits savvy attorneys to postpone indefinitely the deportation of their alien clients. *Amici* do not support removing aliens who qualify for asylum to countries where their lives will be endangered. *Amici* nonetheless believe that there are sufficient checks built into the system that such removals are highly unlikely even if courts abide by Congress's heightened standards for granting stays.

STATEMENT OF THE CASE

Petitioner Jean Marc Nken is a citizen of Cameroon who entered the United States on a transit visa in 2001 and, without authorization, has remained here ever since. Federal immigration authorities initiated removal proceedings against him in 2001. The Board of Immigration Appeals (BIA) issued a final order of removal in June 2006, affirming the decision of an Immigration Judge (IJ) to deny his applications for asylum and withholding of removal and his request for relief under the Convention Against Torture (CAT). J.A. 44-49. In April 2007, the U.S. Court of Appeals for the Fourth Circuit denied his petition for review, upholding (as supported by "substantial evidence") the IJ's findings that Nken was ineligible for asylum, withholding of removal, and protection under the CAT. J.A. 51-54.

In the nearly three years since the final order of removal was issued, Nken has filed three separate motions with the BIA to reopen removal proceedings; all three were denied, and the Fourth Circuit has denied petitions for review with respect to the first two. This case involves Nken's third motion to reopen, filed in May 2008 and entitled, "Motion to Reopen (and Remand) Based on Recently Changed Country Conditions and New Evidence Not Previously Available." J.A. 58-64.

The BIA denied the third motion to reopen in June 2008. J.A. 70-73. The motion to reopen was procedurally barred unless Nken could demonstrate that his evidence of changed conditions in Cameroon was "material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. § 1229a(c)(7)(C)(ii).[2] The BIA determined that Nken had "not presented sufficient facts or evidence" to establish that he met the requirements of § 1229a(c)(7)(C)(ii) and thus denied the motion "as time and number barred." J.A. 71, 73. The

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[2] The general rule provides that an alien may file only one motion to reopen, and that the motion must be filed within 90 days of the final order of removal. 8 U.S.C. § 1229a(c)(7)(A) & (C)(i). However, those limitations do not apply to claims for asylum and withholding of removal that meet the requirements of § (C)(ii) set forth above in the text.

BIA specifically faulted Nken for failing to submit his own statement "articulating his persecution claim" and responding to the IJ's determination that Nken's prior testimony was not credible. J.A. 71.

Nken then petitioned the Fourth Circuit for review of denial of his motion. He also filed a motion to stay his removal pending review of the petition.[3] The Fourth Circuit summarily denied the motion in November 2008. J.A. 74. This Court granted review to determine the proper standard that a court of appeals should apply when considering a motion for stay of removal pending consideration of an alien's petition for review.

SUMMARY OF ARGUMENT

The text of 8 U.S.C. § 1252(f)(2) demonstrates that Congress intended it to supply the standard for judging motions for stay of removal pending consideration of petitions for review. It states unequivocally that unless the standard it sets forth is met, "no court shall enjoin the removal of any alien pursuant to a final order under this section." Under all commonly understood meanings of the word "enjoin," that provision is directly applicable to any request directed by an alien to a federal court to delay removal while the court considers a petition challenging a final removal order.

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[3] Nken styled his motion as a motion for "stay" pending appeal. As explained below, *amici* doubt that "stay" is the most appropriate term to describe the relief that Nken seeks. Nonetheless, for ease of understanding we adopt Nken's terminology.

Nken asserts that an order to "enjoin" removal is somehow different from an order to "stay" removal and thus that his motion to stay removal is not covered by § 1252(f)(2). But his effort to draw a "formal" distinction between "enjoin" and "stay" actually cuts against him. Nken asserts that an "injunction" is relief directed at a particular party, not a tribunal; while a "stay" is a tool used by a court to delay the impact of one of its own decisions or that of an inferior tribunal. Pet. Br. 21-22. Under that definition, "enjoin" best describes the relief that Nken seeks: his motion seeks to prevent immigration officials with the Department of Homeland Security (DHS) from taking an otherwise legal action (removing Nken from the country), not to stay the effect of an order from an inferior tribunal. Section 1252(f)(2) speaks of enjoining "the removal of any alien pursuant to a final order under this section" (*i.e.*, pursuant to a final order of removal), and the relief Nken seeks would do precisely that.

In any event, the "formal" distinction between "enjoin" and "stay" espoused by Nken is not recognized by the law. Both Congress and the courts regularly use the words "stay" and "enjoin"/"injunction" interchangeably, with a "stay" viewed as a subset of the more sweeping term "injunction." Given that history, there is no reason to assume that Congress intended to exclude "stays" (as Nken seeks to define the term) from the scope of § 1252(f)(2). To the contrary, such an intent is highly unlikely. Section 1252(f)(2) was adopted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546. IIRIRA abolished the prior standard governing stays pending appeal (which mandated that noncriminal aliens were entitled to stays in all cases). Thus, § 1252(f)(2) can be deemed inapplicable to stays of removal only if one is willing to assume that Congress intended to abolish the prior standard without specifying what the new standard would be.

Each of the federal appeals courts that has refused to apply § 1252(f)(2) to stays of removal has instead judged stay motions based on that circuit's traditional standards governing the grant of preliminary injunctions. Reported § 1252(f)(2) opinions from those circuits well illustrate the wide disparity in the "traditional" standards that existed in 1996 and that continue to this day. It is difficult to believe that Congress, at the same time that it abolished mandatory stays, intended that an alien's stay application would be governed by the unique preliminary injunction standards of the circuit in which he happened to be located.

Moreover, stays of removal appear to be the *only* type of court action to which § 1252(f)(2) could conceivably apply. Thus, if § 1252(f)(2) is inapplicable here, then it has no application whatsoever; Congress should not be assumed to have adopted the provision for no apparent purpose.

Nken suggests that if § 1252(f)(2)'s somewhat stricter standard is applied to stays of removal, then at least some aliens with valid asylum claims will be removed to countries where they face great risk of persecution or death. But that risk exists regardless what standard is adopted, unless one reverts to the standard unequivocally rejected by Congress in 1996 – granting stays pending appeal to *all* aliens. More importantly, there are numerous safeguards built into the system – before removal proceedings ever reach the courts – to minimize the danger that those with valid asylum claims will be ordered removed. One can reasonably assume that Congress concluded that it had taken sufficient steps to minimize that danger and that judicial intervention (in the form of stays of removal) was unnecessary in the absence of unusually strong evidence that DHS had erred.

Indeed, this Court has observed that the overriding theme of IIRIRA is a congressional desire to reduce judicial interference with good-faith decisions made by Executive Branch officials with respect to immigration matters. That theme recurs in later immigration-related legislation, particularly the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231. Congress has become painfully aware that overly generous judicial review provisions relating to immigration law can frustrate law enforcement efforts, by permitting illegal aliens to drag out the removal process for many years. As *AAADC* recognized, a court-imposed delay in removal is a victory for the alien; it "permits and prolongs a continuing violation of United States law." *AAADC*, 525 U.S. at 490. Reducing those delays by applying § 1252(f)(2)'s relatively strict standards to stay motions is entirely consistent with Congress's desire to prevent immigration enforcement efforts from being tied in knots.

Finally, there is no merit to the efforts of Nken and his supporting *amici* to invoke various rules of statutory construction to bias the interpretation of § 1252(f)(2) in his favor. Nken asserts that ambiguous statutes touching on removal should be construed to favor the alien resisting removal. To the contrary, the guiding principle in construing an immigration statute or any other federal statute ought to be to arrive at an interpretation that best captures congressional intent. In light of Congress's repeated efforts to preserve Executive discretion in the enforcement of immigration law, there is little reason to conclude that Congress adopted those statutes with the intent that close cases should be decided in favor of the alien. The rule of statutory construction relied on by Nken – which is quite limited in nature and which has never been embraced as an actual holding of the Court – has no application here.

ARGUMENT

I. THE TEXT OF § 1252(f)(2) DEMONSTRATES THAT CONGRESS INTENDED IT TO APPLY TO STAYS OF REMOVAL PENDING CONSIDERATION OF A PETITION FOR REVIEW

Section 1252(f)(2), which was added to federal immigration law in 1996 as part of IIRIRA, provides in full:

> Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

Section 1252(f)(2)'s limitation on the authority of federal courts is written in sweeping terms; it applies to the removal of *any* alien and notwithstanding *any* other provision of law. Nken's argument that the provision is inapplicable to a motion for stay of removal pending consideration of a petition for review hinges entirely on the word "enjoin." Nken asserts that a "stay" is wholly distinct from an "injunction" and that the failure to use the word "stay" in § 1252(f)(2) indicates that Congress did not intend the standard of review set forth therein to apply to his motion for a stay.

A. Nken Seeks To Prevent Immigration Officials From Removing Him From the Country, and Thus "Injunction" Is the Most Apt Description of the Relief He Seeks

Even if one accepts Nken's rather crabbed definitions of the relevant words, his argument still fails. Under those definitions, the relief sought by Nken can best be described as an injunction to prevent federal immigration officials from removing him while the Fourth Circuit considers his petition for review. Accordingly, § 1252(f)(2) must be deemed applicable even if one accepts Nken's claim that "stay" and "enjoin" have mutually exclusive definitions.

Nken asserts that an "injunction" is "a legal remedy that governs the conduct of a party to a legal proceeding." Pet. Br. 22. In contrast, he asserts that a "stay" refers only to "the 'postponement or halting of a proceeding, judgment, or the like' and '[a]n order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding.'" *Id.* (quoting *Black's Law Dictionary* 1453 (8th ed. 2004). Nken likens the administrative proceedings before the IJ and the BIA to a judicial proceeding and asserts that a motion to postpone, halt, or suspend a final order of removal can properly be deemed a "stay" but is not an "injunction." *Id.*

A principal flaw in Nken's argument is that he has not asked for a "stay" of the final order of removal; rather, his has asked for a "stay of removal." His initial request to this Court was entitled, "Emergency Motion for a Stay of Removal Pending Adjudication of the Petition for Review." In other words, he is asking that federal immigration officials be prevented from removing him from the United States while he litigates his petition. As he has defined the terms "stay" and "injunction," Nken is asking for an "injunction" against those officials, not a "stay."

Nor is Nken's predicament a product of poor draftsmanship. The federal appeals courts lack the authority to "stay" final orders of removal in the same sense that they can "stay" their own orders or those of an inferior judicial tribunal. The authority of the appeals courts to review final orders of removal is carefully circumscribed by 8 U.S.C. § 1252. Indeed, the federal courts have no jurisdiction whatsoever to review significant portions of the immigration/removal process. For example, judicial review is generally unavailable from a decision by an immigration officer to remove an alien arriving in the United States and who is determined to be inadmissible. 8 U.S.C. § 1252(a)(2)(A). Similarly, judicial review is generally unavailable from a denial of relief from removal, where the relief requested is specified by statute to be in the discretion of immigration officials. 8 U.S.C. § 1252(a)(2)(B).

Furthermore, federal courts in most instances lack jurisdiction to review a final order of removal against an alien who is removable by virtue of having committed a major criminal offense. 8 U.S.C. § 1252(a)(2)(C). Given their limited jurisdiction to review final orders of removal, the federal appeals courts do not occupy a position vis-a-vis immigration-related administrative proceedings that they occupy with respect to federal district courts. They generally lack authority to dictate how the administrative tribunals are to proceed or what kind of orders they may issue. Accordingly, while in some instances they are empowered to prevent immigration officials from removing an alien when those officials have not acted in accordance with law, any such action more closely fits Nken's definition of an "injunction" than it does his definition of a "stay."

As this Court has noted, final orders of removal "are self-executing orders, not dependent on judicial enforcement." *Stone v. INS*, 514 U.S. 386, 398 (1995). Once such an order issues, federal immigration officials are legally empowered to take steps to effect a removal unless barred from doing so by a federal court order. Section 1252(f)(2) speaks of enjoining "the removal of any alien pursuant to a final order under this section" (*i.e.*, pursuant to a final order of removal), and the relief Nken seeks would do precisely that.

B. The Ordinary Meaning of "Enjoin" Includes Any Order Prohibiting Someone from Doing a Specified Act, and Thus Encompasses a Stay of Removal Pending Appeal

In any event, the "formal" distinction between "enjoin" and "stay" espoused by Nken is not recognized by the law. Both Congress and the courts regularly use the words "stay" and "enjoin"/"injunction" interchangeably, with a "stay" viewed as a subset of the more sweeping term "injunction."

At the time that IIRIRA was adopted, *Black's Law Dictionary* defined "enjoin" as follows: "to require; command; positively direct. To require a person, by writ of injunction, to perform or to abstain or desist from, some act." *Black's Law Dictionary* 529 (6th ed. 1990). "Stay" was defined as:

> A stopping; the act of arresting a judicial proceeding by the order of a court. Also, that which holds, restrains, or supports. A stay is a suspension of the case or some designated proceedings within it. *It is a kind of injunction* with which a court freezes its proceedings at a particular point.

Id. at 1413 (emphasis added). As the Eleventh Circuit observed in its decision finding § 1252(f)(2) applicable to motions for a stay of removal, "their definitions and common usage show that the plaining meaning of enjoin includes the grant of a stay." *Bin Weng v. United States AG*, 287 F.3d 1335 (11th Cir. 2002). Thus, there is no reason to conclude that Congress, when it used the word "enjoin" in § 1252(f)(2), intended to exclude from the provision's purview any judicial action that could be deemed a "stay."

Indeed, it is quite clear that Congress did *not* have Nken's definition of "stay" in mind when it used that word in 8 U.S.C. § 1252(b)(3)(B). That provision, also adopted as part of IIRIRA, provides that serving a petition for review "does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise."[4] Had Congress intended to use the word "stay" in Nken's sense, it would have said that serving the petition for review "does not stay the final order of removal." By referring to a "stay" of "removal" rather than to a "stay" of "a final order of removal," Congress must have been using the word "stay" as a synonym for "enjoin" – that is, it was referring to an order barring federal immigration officials from removing the alien pending consideration of the alien's petition for review.

Numerous federal statutes use the word "stay" in that same sense. For example, under the Bankruptcy Code many activities with respect to a debtor are automatically "stayed" by the filing of a bankruptcy petition. 11 U.S.C. § 362. The stay is an injunction against individuals, not against judicial proceedings; indeed many of the stayed activities (*e.g.*, repossession of the debtor's car) do not entail any sort of judicial proceeding. Other federal statutes use the words "stay" and "injunction" interchangeably. *See, e.g.*, the Anti-Injunction Act, 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a State court . . .").

This Court has similarly used the word "stay" to refer to an injunction directing an individual not to engage in a particular action. For example, when the Court, in connection with habeas petitions filed by those on death row, orders State official not to execute the petitioner, it routinely refers to a "stay of execution." *See, e.g., Panetti v. Quarterman*, 127 S. Ct. 2842, 2856 (2007). When used in that sense, the Court is using the word "stay" as a synonym for "injunction"; the court is issuing an order directed at State officials that prevents an action rather than one that postpones a proceeding or judgment (either of its own or of an inferior tribunal).

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[4] Prior to adoption of IIRIRA in 1996, the rule had been the precise opposite: deportation was automatically stayed as soon as a petition for review was filed in a federal appeals court. *See* 8 U.S.C. § 1105a(a)(3) (1994).

In sum, when Congress provided in § 1252(f)(2) that "no court shall enjoin the removal of any alien pursuant to a final order under this section" unless the standards set forth in that provision are met, there is every reason to believe that Congress intended to regulate any judicial act whose effects fall within the commonly understood meanings of "enjoin" (*e.g.*, "to abstain or desist from some act"). A stay of removal pending consideration of the alien's petition for review quite clearly falls within that category.

C. The Only Rational Explanation for § 1252(f)(2) Is That Congress Adopted It in Order to Regulate Stays of Removal

Stays of removal appear to be the *only* type of court action to which § 1252(f)(2) could conceivably apply. Thus, if § 1252(f)(2) is inapplicable here, then it has no application whatsoever; Congress should not be assumed to have adopted the provision for no apparent purpose. *Teshome v. Mukasey*, 528 F.3d 330, 334 (4th Cir. 2008) (§ 1252(f)(2) is applicable to stays of removal because otherwise it would have no purpose; "we will not construe a statute in a manner that reduces some of its terms to mere surplusage").

It is noteworthy that the appeals courts that have held § 1252(f)(2) inapplicable to stays of removal have given virtually no consideration to when § 1252(f)(2) might be applicable. *Amici* are unaware of any federal appellate decision that has applied § 1252(f)(2) outside the context of stays of removal. Nken misleadingly cites *AAADC* as providing guidance regarding when § 1252(f)(2) might apply outside the context of stays of removal. Pet. Br. 37. In fact, the quoted language quite clearly references § 1252(f)(1), not (f)(2). *AAADC,* 525 U.S. at 481-82.

Nken concedes that § 1252(f)(2) regulates the power of federal courts to grant injunctive relief, Pet. App. 37-38, but it does not explain how the issue might arise outside the context of a stay of removal pending consideration of the alien's petition for review. The answer is that it cannot arise in any other context, because various other provisions in § 1252 prevent federal courts from even exercising jurisdiction outside the context of a petition for review of a final order of removal. *See, e.g.,* 8 U.S.C. §§ 1252(b)(9) & (g). Nken's only response is that maybe Congress adopted § 1252(f)(2) as a backstop for some exceptional circumstances (not yet identified by anyone) under which §§ 1252(b)(9) & (g) might not prevent the exercise of jurisdiction in other contexts. Pet. Br. 38. Such speculation is too slender a reed to provide a rational explanation for a statute that acquires meaning only if it is interpreted as being applicable to stays of removal.

D. Petitioner's Counter-Arguments Are Without Merit

In support of their position that § 1252(f)(2) does not apply to stays of removal, Nken and his supporting *amici* parrot many of the statutory construction arguments raised by the various appeals courts that support their position. The federal government's brief thoroughly refutes each of those arguments; accordingly, we only touch upon a few of them briefly.

Nken notes that § 1252(f)(1) limits the authority of federal courts to either "enjoin or restrain" altogether the operations of certain immigration laws. In contrast, § 1252(f)(2) employs only the word "enjoin" when limiting the injunctive authority of federal courts with respect to individual immigration cases. Nken argues that a limiting construction must be placed on the word "enjoin," or otherwise the word "restrain" in § 1252(f)(1) would be reduced to mere surplusage. Pet. Br. 17. That argument is a nonsequitor, at least in a case in which Nken is trying to differentiate between the words "enjoin" and "stay," and not between the words "enjoin" and "restrain." *Amici* note that even the Fifth Circuit, which ultimately agreed with Nken's interpretation of § 1252(f)(2), deemed the enjoin/restrain argument unpersuasive. *Tesfamichael v. Gonzales* 411 F.3d 169 (5th Cir. 2005). Moreover, using two largely synonymous words in succession (like enjoin and restrain) does not render one of the words superfluous; Congress could well determine that by repeating similar words, it is better conveying its intent that it really, really means what it says.

Nken also argues that had Congress wanted to impose a standard for granting stays of removal, it would have done so in § 1252(b)(3)(B) instead of in § 1252(f)(2). That argument is wholly unpersuasive. It is at least as logical to place a standard for when it is proper to enjoin/stay a removal order in the subsection that addresses limits on injunctive relief (§ 1252(f)) as it is to place it in a subsection entitled "Requirements for review of orders of removal" (§ 1252(b)). But even if Nken is correct that § 1252 could have been organized more logically, that observation does nothing to suggest that the words of § 1252(f)(2) should be given anything other than their most natural reading. In any event, both § 1252(b)(3)(B) and § 1252(f)(2) were adopted in 1996 as part of IIRIRA and were placed into the same section – and those circumstances raise a strong inference that the two provisions ought to be read in tandem.

Finally, Nken suggests that if § 1252(f)(2)'s somewhat stricter standard is applied to stays of removal, then at least some aliens with valid asylum claims will be removed to countries where they face great risk of persecution or death. But that risk exists regardless what standard is adopted, unless one reverts to the standard unequivocally rejected by Congress in 1996 – granting stays pending appeal to *all* aliens. More importantly, there are numerous safeguards built into the system – before removal proceedings ever reach the courts – to minimize the danger that those with valid asylum claims will be ordered removed. For example, both the BIA and Immigration Judges are part of the Justice Department and thus are not beholden to immigration enforcement officials within DHS. If an alien against whom removal proceedings have been initiated by DHS has a strong asylum claim, one can reasonably expect that either the IJ or the BIA will pick up on that fact and grant the claim. Moreover, DHS officials who come to believe that removal poses a serious threat to the safety of an alien also are empowered to exercise their discretion to withhold removal. One can reasonably assume that Congress, when it adopted § 1252(f)(2), concluded that it had taken sufficient steps to minimize that danger and that judicial intervention (in the form of stays of removal) was unnecessary in the absence of unusually strong evidence that DHS had erred.

II. APPLYING § 1252(f)(2) TO STAYS OF REMOVAL IS CONSISTENT WITH THE STRUCTURE AND LEGISLATIVE HISTORY OF IIRIRA

This Court has observed that the overriding "theme" of IIRIRA is a congressional desire to reduce judicial interference with good-faith decisions made by Executive Branch officials with respect to immigration matters. *AAADC*, 525 U.S. at 486. For example, as noted above, IIRIRA placed entire classes of removal decisions beyond the reach of federal court jurisdiction. *See, e.g.*, 8 U.S.C. § 1252(a)(2)(A), (B), & (C); § 1252(b)(4)(D).

That theme recurred in later immigration-related legislation, particularly the REAL ID Act of 2005. That statute, adopted largely in response to the Court's decision in *St. Cyr*, eliminated virtually all habeas corpus jurisdiction over claims raised by aliens facing removal orders. In *St. Cyr* and later decisions, the Court made clear that it will not interpret a statute as eliminating habeas jurisdiction unless the statute explicitly cites the federal habeas statute, 28 U.S.C. § 2241. *See, e.g., Demore v. Kim*, 538 U.S. 510 (2003). Congress rose to the challenge with the REAL ID Act; that statute added explicit references to 28 U.S.C. § 2241 to virtually every jurisdiction-limiting provision of 8 U.S.C. § 1252.

In light of Congress's manifest desire to protect the Executive's discretion from the courts in the area of immigration enforcement, it makes eminent sense to interpret § 1252(f)(2) as a limitation upon the power of courts to stay removal pending consideration of an alien's petition for review.

Each of the federal appeals courts that has refused to apply § 1252(f)(2) to stays of removal has instead judged stay motions based on that circuit's traditional standards governing the grant of preliminary injunctions. Reported § 1252(f)(2) opinions from those circuits well illustrate the wide disparity in the "traditional" standards that existed in 1996 and that continue to this day. For example, the Ninth Circuit has held that a stay of removal should be granted if the alien demonstrates "either (1) a probability of success on the merits and the possibility of irreparable injury, or (2) that serious legal questions are raised and the balance of hardships tips sharply in the petitioner's favor." *Andreiu v. Ashcroft*, 253 F.3d 477, 483 (9th Cir. 2001) (*en banc*). The Seventh Circuit employs a "sliding scale" approach "under which the more likely it is that the [alien] will succeed on the merits, the less the balance of irreparable harms need weigh toward [his] side" and "the less likely it is the [alien] will succeed, the more he balance need weigh toward [his] side." *Sofinet v. INS*, 188 F.3d 703, 707 (1999). Other circuits have required aliens to demonstrate *both* likelihood of success on the merits *and* irreparable harm in the absence of a stay. *See,, e.g., Tesfamichael*, 411 F.3d at 171-72.

Congress can be presumed to have been aware, when it adopted IIRIRA, that various federal circuits employed markedly different standards for granting preliminary injunctions. Yet if Nken's interpretation of IIRIRA is correct, Congress intended that the standard for granting stays of removal should follow each circuit's standard for granting preliminary injunctions. It is difficult to believe that Congress, at the same time that it abolished mandatory stays, intended that an alien's stay application would be governed by the unique preliminary injunction standards of the circuit in which he happened to be located.

Moreover, IIRIRA abolished the prior, uniform standard governing all motions for stays of removal (which mandated that noncriminal aliens were entitled to stays in all cases). *See* 8 U.S.C. § 1105a(a)(3) (1994). Thus, § 1252(f)(2) can be deemed inapplicable to stays of removal only if one is willing to assume that Congress intended to abolish the prior standard without specifying what the new standard would be.

As *AAADC* recognized, a court-imposed delay in removal is a victory for the alien; it "permits and prolongs a continuing violation of United States law." *AAADC*, 525 U.S. at 490. Reducing those delays by applying § 1252(f)(2)'s relatively strict standards to stay motions is entirely consistent with Congress's desire to prevent immigration enforcement efforts from being tied in knots.

III. THERE IS NO BASIS FOR INVOKING A PRESUMPTION THAT AMBIGUOUS STATUTES SHOULD BE CONSTRUED IN FAVOR OF AN ALIEN RESISTING DEPORTATION

Nken asserts that ambiguous statutes touching on removal should be construed in favor of the alien resisting deportation. Pet. Br. 19. Nken's efforts to invoke this alleged rule of statutory construction should be rejected for several reasons.

First, the presumption relied on by Nken should be invoked, if at all, only as a last resort in those cases in which normal rules of statutory construction fail to provide any basis for resolving the alleged ambiguity. Here, once those rules of statutory construction are applied, there is no remaining ambiguity. Second, no cases cited by Nken embrace his presumption as a holding; in each case, the Court's discussion is dictum. Third, Nken's presumption makes no sense as an accurate predictor of how Congress would want such issues resolved; to the contrary, all indications are that Congress would wish close cases to be resolved in *favor* of deportation.

The Presumption as a Last Resort. Nken invokes his presumption even before he begins his statutory analysis. Pet. Br. 19-20. But as this Court recently noted, that sort of argument "puts the cart before the horse." *Fernandez-Vargas v. Gonzales,* 126 S. Ct. 2422, 2430 (2006). The Court explained that any presumption favoring aliens facing deportation should be employed, if at all, as a *last* resort, not "as a tool for interpreting the statute" on a par with other, normally employed interpretive tools. *Id.* Such a presumption could be applicable, if at all, only where Congress's purpose is largely inscrutable. It has no place where, as here, there are numerous *direct* indications of Congress's intent – including all of the analysis set forth in the preceding sections of the brief.

No Full Embrace of the Presumption. In support of invoking a tie-goes-to-the-alien presumption, Nken cites several decisions of this Court over the past 60 years. However, in none of those cases did the Court rely on such a presumption as part of its holding. Rather, only after deciding the cases in favor of the alien did the Court mention the presumption in *dicta*. *See, e.g., INS v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987) (Court overturns denial of asylum claim based on "the plain language of the [INA], its symmetry with the United Nations Protocol, and its legislative history. . . We finds these canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."); *INS v. Errico,* 385 U.S. 214, 225 (1966) (after construing the INA as saving an alien from deportation despite the alien having misrepresented his status to gain entry into the United States, Court adds, "Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."); *Costello v. United States*, 376 U.S. 120, 128 (1964) (Court construes statutory deportation provision in favor of alien, then adds that even if the statute's meaning were in doubt, that doubt should be resolved "in favor of the alien."). Accordingly, despite the Court's occasional reference to the presumption as "longstanding" in nature, *Dada v. Mukasey*, 128 S. Ct. 2307, 2318 (2008), it has never been fully embraced by the Court as part of a holding in a case.

No Reason to Presume that Congress Wishes Aliens to Prevail in Close Cases. It is worth noting that the presumption that Nken seeks to invoke developed not as a result of any special solicitude for aliens facing deportation, but from a belief that Congress does not normally write irrational statutes. The Court first articulated the presumption in *Delgadillo v. Carmichael*, 332 U.S. 388 (1947), a deportation case that turned on whether petitioner Delgadillo had "entered" the United States within the previous five years; if so, he was subject to deportation. Although Delgadillo had lived continuously in the United States for 20 years, a ship on which he was working was torpedoed along the Florida coast in 1942, and survivors were brought to Havana, Cuba. The government argued that his arrival in Miami, Florida from Havana one week later should be deemed an "entry" for purposes of the relevant deportation statute. In rejecting that interpretation as "capricious," the Court explained:

> [T]he stakes are indeed high and momentous for the alien who has acquired his residence here. We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are asked to subject the alien are too irrational to square with the statutory scheme.

Delgadillo, 332 U.S. at 391. In other words, the courts interpret statutes in a manner that favors aliens facing deportation when not doing so will lead to capricious yet momentous results, not because Congress necessarily intended that aliens be given the benefit of the doubt in close cases.

Later decisions of this Court erroneously pointed to *Delgadillo* as creating a tie-goes-to-the alien rule. But the only rationale put forward in later decisions in support of such a rule was that the consequences of a deportation order are so heavy that it should not be issued in the absence of a clear mandate. For example, in a case involving efforts to deport a man convicted of two murders, the Court said:

> We resolve the doubts in favor of [the] construction [of the deportation statute presented by the alien] because deportation is a drastic measure and at times the equivalent of a banishment to exile, *Delgadillo v. Carmichael*, 332 U.S. 388. . . . [S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

Amici respectfully request that the Court use this case to extinguish the notion that aliens are entitled to special solicitude in deportation proceedings. Justice Douglas was no doubt correct in *Fong Haw Tan* that a deportation decision has major consequences, but that is not a reason to bias the outcome in favor of one party or the other. The outcome of a deportation proceeding is just as important to society at large as it is to an alien felon facing deportation – the safety of all Americans depends on the government's ability to deport such aliens as quickly as possible.

The guiding principle in construing an immigration statute or any other federal statute is to arrive at an interpretation that best captures congressional intent. *See, e.g., Gade v. National Solid Waste Management Ass'n,* 505 U.S. 88, 98 (1992) ("The purpose of Congress is the ultimate touchstone"). In light of Congress's repeated efforts to restrict the jurisdiction of federal courts to second-guess immigration-related decisions rendered by Executive Branch officials, there is little reason to conclude that Congress adopted those statutes with the intent that close cases should be decided in favor of the alien felon. There may be immigration provisions in which Congress has indicated a desire that the alien be given the benefit of the doubt, but 8 U.S.C. § 1252(f)(2) is not one of them. In light of Congress's repeated efforts to decrease the lag time between entry of a final order of removal and the date on which the alien is finally removed, there can be no basis for maintaining a blanket rule that Congress intended the courts to give the benefit of the doubt to the alien in all deportation cases.

CONCLUSION

Amici curiae Washington Legal Foundation and Allied Educational Foundation respectfully request that the Court affirm the decision of the court of appeals.

Respectfully submitted,

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Dated: January 8, 2009

JOINT
APPENDIX

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Supreme Court, U.S.
FILED

DEC 19 2008

OFFICE OF THE CLERK

No. 08-681

IN THE
Supreme Court of the United States

JEAN MARC NKEN,
Petitioner,
v.
MICHAEL MUKASEY,
UNITED STATES ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 25, 2008
CERTIORARI GRANTED NOVEMBER 25, 2008

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General Docket
United States Court of Appeals
for the Fourth Circuit

Court of Appeals Docket #: 08-1813 Docketed: 07/28/2008
Jean Nken v. Michael Mukasey

Appeal From: Board of Immigration Appeals

JEAN MARC NKEN,

Petitioner

v.

MICHAEL B. MUKASEY, Attorney General,

Respondent

07/23/2008	1	Petition for review of agency order (FRAP 15) filed by Jean Marc Nken. [997903757]
07/28/2008		Immigration Petition for Review case docketed. Originating case number: A95-223-548. Case manager: TAkseraylian.
07/28/2008	2	Filing fee paid. Amount received: 450
07/31/2008	3	DOCKETING NOTICE issued. Re: [997903756-2],case docketed Initial forms due within 14 days.. Originating case number: A95-223-548.
07/31/2008	4	BRIEFING ORDER filed. Administrative Record due 09/09/2008. Opening Brief and Appendix due: 10/20/2008. Response

		Brief Due 11/21/2008
08/05/2008	5	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Yamileth G. Handuber for Michael B. Mukasey. [997909634]
08/05/2008	6	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Daniel E. Goldman for Michael B. Mukasey. [997909635]
08/06/2008	7	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Jared O. Freedman for Jean Marc Nken. [997910302]
08/06/2008	8	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Lindsay C. Harrison for Jean Marc Nken. [997910308]
08/06/2008	9	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Petitioner Jean Marc Nken. Was any question on Disclosure Form answered yes? No [997910316]
08/06/2008	10	DOCKETING STATEMENT filed by Petitioner Jean Marc Nken.
08/06/2008	11	MOTION filed by Petitioner Jean Marc Nken motion to stay deportation pending review. Date of service: 08/06/2008 [997910551]
08/07/2008	12	NOTICE ISSUED to Michael B. Mukasey requesting response to Motion for other relief (stay of deportation) [997910551-2] Response due: 08/13/2008. [997910717]

08/13/2008	13	RESPONSE/ANSWER filed by Michael B. Mukasey to notice requesting response [997910717-2], Motion for other relief [997910551-2]. Nature of response: in opposition.
09/05/2008	14	ADMINISTRATIVE RECORD filed in electronic format on behalf of Michael B. Mukasey.
10/15/2008	15	MOTION filed by Petitioner Jean Marc Nken to extend filing time for opening brief and appendix. Date of service: 10/15/2008 [997956242]
10/15/2008	16	ORDER filed [997956410] granting Motion to extend filing time [997956242-2]; updating/ resuming briefing order deadlines. Opening brief and appendix due 10/30/2008. Response brief due 12/01/2008 Copies to all parties.
10/30/2008	17	BRIEF filed by Petitioner Jean Marc Nken in electronic and paper format. Type of Brief: Opening. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 10/30/2008. [997967425]
10/30/2008	18	Notice of paper filing of appendix. Date paper copies mailed, dispatched or delivered to court: 10/30/2008. Method of filing paper copies: hand delivery.
10/30/2008	23	OPENING BRIEF (PAPER) file-stamped, on behalf of Jean Marc

		Nken. Number of pages: [43]. Entered on Docket Date: 11/19/2008. [997979838]
10/30/2008	24	APPENDIX (PAPER) file-stamped, on behalf of Jean Marc Nken. Total number of volumes (including any sealed): 2. Total number of pages in all volumes: 904. Total number of sealed volumes: 0. Entered on Docket Date: 11/19/2008. [997979846]
11/05/2008	19	COURT ORDER filed [997971198] denying Motion for other relief [997910551-2] Copies to all parties.
11/13/2008	20	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Lindsay E. Williams for Michael B. Mukasey. [997976011]
11/14/2008	21	MOTION filed by Respondent Michael B. Mukasey to extend filing time for response brief until 12/22/2008. Date of service: 11/14/2008 [997977541]
11/17/2008	22	ORDER filed [997978263] granting Motion to extend filing time [997977541-2]; updating/ resuming briefing order deadlines. Response brief due 12/22/2008 Copies to all parties.
11/26/2008	25	BRIEF filed by Respondent Michael B. Mukasey in electronic and paper format. Type of Brief: Response. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court:

		11/26/2008. [997985427]
11/26/2008	26	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Jennifer Paisner Williams for Michael B. Mukasey. [997985437]
11/26/2008	27	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by David V. Bernal for Michael B. Mukasey. [997985454]
11/26/2008	33	RESPONSE BRIEF (PAPER) file-stamped, on behalf of Michael B. Mukasey. Number of pages: [35]. Entered on Docket Date: 12/09/2008. [997991723]
12/02/2008	28	SUPREME COURT REMARK--petition for writ of certiorari filed. 11/25/2008. 08-681.
12/02/2008	29	SUPREME COURT REMARK--other action. Stay of removal granted pending further review of the Court.
12/02/2008	30	SUPREME COURT REMARK--petition for writ of certiorari granted. 11/25/2008
12/02/2008	31	MOTION filed by Petitioner Jean Marc Nken to extend filing time for reply brief. Date of service: 12/02/2008 [997987601]
12/02/2008	32	ORDER filed [997987690] granting Motion to extend filing time [997987601-2]; suspending time for filing reply brief until 14 days after Supreme Court's opinion on stay issue. Copies to all parties.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGATION REVIEW
UNITED STATES IMMIGRATION COURT
Baltimore, Maryland

No. A 95 223 548 April 23, 2003

In the Matter of)
JEAN MARC NKEN) In Removal Proceedings
Respondent)

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act - remained in the United States for a longer time than permitted.

APPLICATIONS: Section 208(a) of the Immigration and Nationality Act - asylum; Section 241(b)(3) of the Immigration and Nationality Act - withholding of removal; withholding of removal under the U.N. Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention).

ON BEHALF OF RESPONDENT:

Juan C. Washington, Esquire
966 Hungerford Drive
Suite 8-B
Rockville, MD 20850

ON BEHALF OF DHS:

Arthur Gottlieb
Assistant Chief Counsel
Baltimore, MD

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Cameroon who was last admitted to the United States at Miami, Florida on or about April 1, 2001 as a non-immigrant C-4 (transit) with authorization to remain in the United States for a temporary period not to exceed April 9, 2001. He remained thereafter without authorization from the Immigration and Naturalization Service (now known as the Department of Homeland Security).

On or about February 12, 2002, he was served with a Notice to Appear by the INS. *See* Exhibit 1. In the ~~NA~~ NTA, the INS charges the respondent with being removable as set forth above. At a Master Calendar proceeding, respondent admitted the factual allegations in the Notice to Appear, and conceded his removability from the United States. He did not designate a country of removal should that become necessary, and the Court designated Cameroon. Based on respondent's concession of removability, this Court does find that his removability has been established by clear and convincing evidence in accordance with Section 240(c) (3) (A) of the Act.

On or about December 19, 2001, the respondent filed an asylum application, Form I-589, with the INS. This application was subsequently referred to the Immigration Court by the INS pursuant to 8 C.F.R. 208.14. The I-589 and the documentation attached thereto, including the respondent's affidavit, has been marked into evidence as Group Exhibit No. 2. The respondent is seeking asylum from Cameroon based on his testimony that on account of his opposition activities, he was arrested and detained on two different occasions in Cameroon. He fears returning to that country at the present time.

His application for asylum is also deemed to be an application for withholding of removal pursuant to Section 241(b)(3) of the Act, and withholding under the Torture Convention.

Marked into evidence as Exhibit No. 3 is the respondent's updated affidavit. The respondent has submitted numerous additional supporting documentation. These documents can be found at Group Exhibit 4, Tabs B through I, Group Exhibit 5, Tabs J through L, Group Exhibit 6, Tabs M through O, and Group Exhibit 7, Tabs P and Q. Marked into evidence as Group Exhibit No. 8 are two documents from the respondent. These are to be found at Tabs B and C. These are duplicates of documents that were previously submitted, but have more complete translations. Exhibit No. 9 is a State Department *Country Reports on Human Rights Practices* for Cameroon for the year 2002.

In support if his application for asylum, the respondent testified on his own behalf.

TESTIMONY OF RESPONDENT

He stated that he was born in Cameroon. He last entered the United States on a transit visa in April of 2001. He was coming from the Bahamas where he had been attending a conference. He had previously transited the United States in January of 2001 on route to the Bahamas. He was coming from Cameroon. He stated that he remained approximately two months in the Bahamas. He stated that he attempted to apply for political asylum in the Bahamas, but as best as this Court could understand his testimony, he was not permitted to do so because there were no forms available for him to apply for this relief. He also stated that he was arrested and detained in the Bahamas for one month. He stated that he does not know why he was arrested and detained for one month. When asked directly by the Court if he had been deported, he stated that he was not quite sure what happened, he simply appeared before someone who he stated was not a Judge, and he was given permission to leave and, hence, his arrival in the United States in April of 2001. He stated that in

April of 2001, he did not return to Cameroon because he has "enormous problems" in that country, and his life would be in danger if he returns. He stated that he was arrested on two different occasions in Cameroon on account of his anti-Government activities.

His first arrest occurred in October of 1990. He stated that at this time he was a student at the University of Yaoundé, and a member of a student organization which was the forerunner to what was later known as Parl~~ia~~ement. He stated that he was arrested while participating in a demonstration, a student demonstration against the Government. The purpose of the march was to protest against the Government's refusal to permit free speech and democracy in that country. The respondent stated that he was an influential member of this particular organization.

He was questioned by the Government with reference to a letter from a friend of his at Tab L which states that the respondent was a secretary general of this particular organization, as well as being a propaganda delegate. The respondent stated that this letter was incorrect insofar as it states that he was a secretary general. He was merely a propaganda delegate. Additionally, his updated affidavit advises that he was instrumental in organizing this march, whereas his first affidavit attached to his asylum application makes no mention of any leadership role in this student organization or any involvement in the planning of this march. He stated that his first attorney was not very helpful in preparing this particular application, hence, the lack of detail in the first affidavit.

He stated that while participating in this march, the police d~~r~~escended on the marchers, threw water on them, and chased them with batons. More than 1,000 people were participating in the demonstration. The respondent stated that he was, in fact, arrested and brought to a nearby police station. He was kept there for a few hours and then brought to another location known as the Americana prison in Yaoundé. He was detained at this prison for approximately one month. He was interrogated frequently, and beaten frequently when he did not respond in a manner satisfactory to his captors. He was questioned about ~~t~~his ethnicity, his family, and about who was behind this particular student organization. He stated that, as mentioned above, he was beaten on several different occasions. He cannot recall exactly how many times he was beaten. He stated that he was simply released one day when two guards came to his cell, told him to get dressed, and then drove him to ~~the~~ downtown Yaoundé where they simply let him go. He stated that he stopped a taxi who brought him to the home in Yaoundé where he had been living with his brother. His brother paid the taxi.

He stated that he remained in Yaoundé for a brief period of time, and then went to his parents in Douala. He did not return to the University of Yaoundé as he did not feel it was safe for him to do so. His father then made arrangements for him to flee Cameroon. The respondent stated that he fled to the Ivory Coast for two reasons, one, that he did not need a visa to go into ~~the~~at country, and, secondly, that a friend of his had a sister who resided in the Ivory Coast and ~~who~~he thought he might secure ~~his~~her assistance. Upon arrival in the Ivory Coast, he did go to this woman's home. She directed him towards students ~~where~~ He then found and made his living arrangements.

He stated that he remained in the Ivory Coast for 10 years following a program in pharmaceutical science. He stated that it was an eight year program. He stated that he completed the case work, but did not complete his thesis due to a coup d'état in the Ivory Coast and his ensuing departure and as a result of the chaos in that country. He stated that his Immigration status in the Ivory Coast was always that of a student. He enrolled at the beginning of 1991 at the university in the Ivory Coast.

He then became a member of the Association of Cameroonian Students whose purpose was to assist students such as he who had fled from the ~~Cameroon~~the Ivory Coast as a result of political problems. He stated that he received membership cards from this association, but they were left behind when he fled the Ivory Coast. He stated that he was originally just an active member of this organization, and he then from 1994 to 1997 became the general secretary. His responsibilities as general secretary were to organize meetings, find meeting locations, and to keep notes and important documentation.

He stated that this particular student organization participated in three sit-in type situations at the Cameroonian Embassy in ~~Cameroon~~the Ivory Coast. The first occurred in 1993. The purpose of this sit-in was to try to ameliorate the plight [sic] students in Cameroon who were being mistreated. He stated that as a result of this sit-in, he and others were arrested by the Ivory Coast police and detained for a few days. In June of 1997, the students presented a petition to the Cameroonian Embassy. They had received a report that the legislative elections of May had been fraudulent. They were petitioning for fair elections. The third sit-in at the Cameroonian Embassy in the Ivory Coast occurred in October of 1997, a week before the upcoming presidential elections. The purpose of bringing a petition to the Cameroonian Embassy was to petition for fair elections in that country.

He stated that he left the Ivory Coast in December of 2000. There was a coup d'état in the Ivory Coast and ~~security was rampant,~~ foreigners were no longer regarded kindly. He was harassed, and, thus, he felt he needed to leave ~~Cameroon~~the Ivory Coast. He, therefore, contacted his father who told him to return to Cameroon. He stated that this was the first time that he returned to Cameroon in 10 years. He was questioned by the Court as to where his passport was. He stated that he thought the Government had it. The Government had no copy of the respondent's passport. He stated that he arrived at the airport in Douala, in Cameroon. He was arrested immediately because he was suspected of being involved in an armed group against the Government of Cameroon. He stated that he was detained in Douala for approximately 30 days. He was interrogated about this armed group, and he was beaten several times. He stated this father bribed the authorities, and he was released. After his release, he went to his parents' home in Douala where he remained for one day. He then made his way to Yaoundé so that he could make arrangements to depart the country. It was in Yaoundé, 300 kilometers away, that he first sought medical treatment. He was questioned as to why he waited until Yaoundé to seek medical treatment. He stated that the purpose of going to Yaoundé was not necessarily to seek medical treatment, but it was to try to get his letter of invitation to the medical symposium in the Bahamas and then to make his arrangements to leave Cameroon.

He was questioned as to the summons which he states was issued and left with his father after he had departed Cameroon. It was pointed out to him that there appears to be several errors in the English language on this document. He stated that he had no explanation for this other than perhaps where the summons was issued, French is the primary spoken language. He was questioned with reference to a letter to be located at Tab M, the author residing in Silver Springs, Maryland. He stated that this individual was not a witness because he was perhaps too frightened to appear.

He was questioned by the Government as to how he supported himself in the Ivory Coast from

January of 1991 to July of 2000 while he was studying. He stated that he supported himself through the student union, and at times his father helped him. It was then pointed out to him by the Government that he had a pay slip from Afracare dated 1995 with an annual salary. He stated that this was a paid internship, and when he stated that he was supported through students and his father, he was referring only to before 1995.

STATEMENT OF THE LAW

The respondent bears the evidentiary burdens of proof and persuasion in any application for withholding of removal under Section 241(b)(3) or asylum under Section 208 of the Act. *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), modified; *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

An alien seeking asylum in the United States bears the burden of establishing that he or she meets the refugee definition of Section 101(a)(42)(A) of the Act. *Matter of S-P-*, Int. Dec. 3287 (BIA 1996). In meeting this burden, the respondent must demonstrate that he or she has suffered past persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or must satisfy the well-founded fear standard of eligibility required for asylum under Section 208 of the Act. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

To satisfy the well-founded fear standard, a respondent must show that a reasonable person in his or her circumstances would fear persecution. *Matter of Kasinga*, Int. Dec. 3278 (BIA 1996).

To be eligible for withholding of deportation pursuant to INA Section 241(b)(3)~~243(h)~~, an alien's facts must show clear a probability of persecution in the country designated for removal on account of race, religion, nationality, membership in a particular group, or political opinion. *INS v. Stevic*, 467 U.S. 407 (1984).

To be eligible for relief under the Torture Convention, an alien must show that it is "more likely than not" that he or she would be tortured if removed to the proposed country of removal. *See* 8 C.F.R Section 208.16(c)(2).

ANALYSIS

Based on the totality of the evidence, this Court must find that the respondent has failed to meet his burden in establishing past persecution, or that he has currently a well-founded fear of future persecution should he return to Cameroon at the present time. In light of this finding, this Court need not and will not address the issue of respondent's firm resettlement in the Ivory Coast.

1. At the outset, this Court finds improbable respondent's actions in allegedly fleeing from Cameroon in 1990. He stated that he was fleeing for his life, yet this Court finds it curious that reaching a safe haven in the ~~Cameroon~~Ivory Coast, he did not apply for asylum in that country. He has

produced no evidence that he could not do so. Moreover, the Court finds it very curious that the respondent could enter the Ivory Coast and almost immediately apply for and be accepted to the university in that country despite being a foreigner. In sum, this Court queries whether or not the respondent had indeed applied to school in the Ivory Coast before leaving the Cameroon, and indeed proceeded to the Ivory Coast for the purpose of going to school.

2. With reference to political activities in Cameroon in 1990, this Court notes the letter from respondent's friend at Tab L which in sum states that the respondent was secretary general of a student organization in Cameroon in addition to being a propaganda delegate. The respondent states that he was never the secretary general of the student organization. This Court questions the basis for this author's statement.

3. This Court notes that respondent's original asylum application makes no mention of having any leadership role in the student organization despite his testimony today that he was a propaganda delegate. His original application makes no mention of his having helped the organization plan the 1990 demonstration which resulted in his arrest. This Court notes that he was assisted by an attorney with his original application.

4. This Court notes the following. Respondent testified that upon his release from prison in 1990 in Cameroon, he went to his home in

Yaoundé where he and his brother had lived together. His brother paid for his taxi. He then went to his father's home in Douala, 300 kilometers way, travelling by a bus. His updated affidavit states that he immediately went to his father's home where his brother was waiting, and the brother paid for the taxi.

This Court further questions how after having been detained for a month, and having been beaten in the manner in which he so described, the respondent was able physically to take a 300 kilometer bus trip.

5. This Court notes the incorrect English in the summons that the respondent stated was issued against him in Cameroon, i.e., the use of the word "abite," "A B I T E," for presumably the word abide, "A B I D E;" the use of the phrase "holding and, A N D, identification," supposedly instead of "holding an, A N, identification," and, finally, "you shall be forced to come with extra punishment," a phase which quite frankly makes no sense.

This Court notes that this summons, an official Government document, has not been authenticated pursuant to 8 C.F.R. 287.6, and this Court gives it de minimis weight.

6. This Court notes respondent's vagueness and evasiveness when questioned by the Government as to how he supported himself for 10 years in the Ivory Coast. He stated initially when questioned by the Government as to how he

supported himself between 1991 and 2000, that he was supported with the assistance of the student union and occasionally his father. It was only when it was pointed out to him that he presented a pay slip from Afracare showing an annual salary that he then stated, oh, yes, after 1995 he was involved in a paid internship. Indeed, respondent's evasiveness in answering this question leads this Court to question what exactly the respondent was doing in the Ivory Coast for 10 years.

7. This Court further notes his evasiveness when questioned as to what happened to him in the Bahamas. This Court seriously doubts that he would not be permitted to apply for political asylum because there were no forms available. This Court further seriously doubts that he would be detained for one month in the Bahamas and yet not be informed as to why he was being so detained. This Court again queries as to exactly what was the respondent's situation in the Bahamas and this Court doubts that the respondent was being totally forthcoming with the Court.

8. This Court further finds curious with reference to his second arrest that the respondent who said that he was beaten on numerous occasions while detained in Douala would not seek medical assistance in Douala when released from prison. Indeed, he travelled 300 kilometers to Yaoundé where he sought medical treatment for nose bleeding, back injuries, and abdominal pains, and apparently a balance problem When questioned as to why this was so, the respondent stated that the

primary purpose of his trip to Yaoundé was not to seek medical attention. This Court, therefore, questions whether or not the respondent was indeed injured as he so stated while in detention, and, indeed, whether or not he was detained as he so claimed. This Court notes that the letters that he has submitted on his behalf have not been notarized, and, thus, this Court has no way of determining their authors. Furthermore, he has presented no proof as to the relationship to his alleged father and brother who wrote letters on his behalf.

Thus, based on the totality of evidence, this Court does find that the respondent has failed to meet his burden in establishing past persecution, or that he has a well-founded fear of future persecution should he return to Cameroon at the present time. Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it follows that he has failed to satisfy the clear probability standard of eligibility for withholding of removal under INA Section 241(b)(3).

For the aforementioned reasons, this Court also finds that the respondent has failed to meet his burden in establishing that it is more likely than not that he would be tortured as contemplated by the Torture Convention were he to return to Cameroon at the present time.

The respondent was not physically present in the United States for one year prior to service of the Notice to Appear, and, thus, is statutorily ineligible for voluntary departure.

According, the following orders are entered.

ORDERS

IT IS HEREBY ORDERED that the respondent's application for asylum be denied.

IT IS HEREBY ORDERED that the respondent's application for withholding of deportation under INA Section 241(b)(3) be denied.

IT IS HEREBY ORDERED that the respondent's application for relief under the Torture Convention be denied.

IT IS HEREBY ORDERED that the respondent be removed and deported from the United States to Cameroon on the charged contained in the Notice to Appear.

/s/

JILL H. DUFRESNE
Immigration Judge

IMMIGRATION COURT
31 HOPKINS PLAZA, ROOM 440
BALTIMORE, MD 21201

In the Matter of

NKEN, JEAN MARC Case No.: A95-223-548

Respondent IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Apr. 23, 2003.

This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to [Cameroon] or in the alternative to

____

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to ____________ alternative to ____________

[ ] Respondent's application for voluntary departure was granted until __________ upon posting a bond in the amount of $__________ with an alternate order of removal to __________

[ ] Respondent's application for asylum was ( ) granted (X) denied ( ) withdrawn.

[ ] Respondent's application for withholding or removal was ( ) granted (X) denied ( ) withdrawn.

[ ] Respondent's application for cancellation or removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation or removal was ( ) granted under section 240A(b)(1) ____ ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a wavier under section ______ of the INA was ( ) granted ( ) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section ______ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $__________ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[X] Other: Relief under the Torture Convention is denied.

Date: Apr. 23, 2003
Appeal: Waived/Reserved Appeal Due by 5/23/03

/s/
JILL H. DUFRESNE
Immigration Judge

Alien Number: 95-223-548

Alien Name: NKEN, JEAN MARC

LIMITATIONS ON DISCRETIONARY RELIEF FOR FAILURE TO APPEAR

( ) 1. You have been scheduled for a removal hearing, at the time and place set forth on the attached sheet. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A, below) for a period of ten (10) years after the date of entry of the final order of removal.

( ) 2. You have been scheduled for an asylum hearing, at the time and place set forth on the attached notice. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A below) for a period of ten (10) years from the date of your scheduled hearing.

( ) 3. You have been granted voluntary departure from the United States pursuant to section 240B of the Immigration and Nationality Act, and remaining in the United States beyond the authorized date other than because of exceptional circumstances beyond your control** will result in your being ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A below) for ten (10) years from the date of the scheduled departure or the date of unlawful reentry, respectively. Your voluntary departure bond, if any, will also be breached. Additionally, if you fail to voluntarily depart the United States within the time period specified, you shall be subject to a civil penalty of not less than $1000 and not more than $5000.

(X) 4. An order of removal has been entered against you. If you fail to appear pursuant to a final order of removal at the time and place ordered by the INS, other than because of exceptional circumstances beyond your control** you will not be eligible for certain forms of relief under the Immigration and Nationality Act (see Section A below) for ten (10) years after the date you are scheduled to appear.

**the term "exceptional circumstances" refers to circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

A. THE FORMS OF RELIEF FROM REMOVAL FOR WHICH YOU WILL BECOME INELIGIBLE ARE:

1) Voluntary departure as provided for in section 240B of the Immigration and Nationality Act;

2) Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act; and

3) Adjustment of status or change of status as provided for in Section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English. Oral notice of the contents of this notice must be given to the alien in his/her native language, or in a language he/she understands by the Immigration Judge.

Date:
Immigration Judge: /s/ or Court Clerk:

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE: (P) TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [X] ALIEN's ATT/REP [X] INS

DATE: [4/23/03] BY: COURT STAFF: /s/

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A95 223 548 - Baltimore Date: Aug. 12, 2004

In re: JEAN MARC NKEN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Juan C. Washington, Esquire

ON BEHALF OF DHS: Arthur H. Gottlieb
Assistance Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States in violation of law

APPLICATION: Asylum; withholding of removal; Convention Against Torture

ORDER:

PER CURIAM. The respondent appeals from the Immigration Judge's April 23, 2003, denial of his applications for asylum and withholding of removal pursuant to sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a), 1231(b)(3), and for protection under the

Convention Against Torture. *See* 8 C.F.R. §§ 1208.16(c), 1208.18. On appeal, the respondent contends that the Immigration Judge erred by denying him relief. The Immigration Judge raised numerous problems relating to the respondent's credibility and her ultimate conclusion finding the respondent to be ineligible for relief appears to be based largely on the credibility problems. We observe, however, that the Immigration Judge did not make a specific adverse credibility finding in this instance. Under our standard of factual review, we cannot make a *de novo* determination of credibility on appeal. *See* 8 C.F.R. §§ 1003.1(d)(3)(i), (ii). Consequently, the record is remanded to the Immigration Court to make a specific credibility finding in accordance with the standards articulated by the Board.

/s/

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGATION REVIEW
UNITED STATES IMMIGRATION COURT
Baltimore, Maryland

No. A 95 223 548 March 4, 2005

In the Matter of)
JEAN MARC NKEN) In Removal Proceedings
Respondent)

CHARGE: Section 237 (a) (1) (B) of the Immigration and Nationality Act – remained in the United States for a longer time than permitted.

APPLICATIONS: Section 208(a) of the Immigration and Nationality Act – asylum; Section 241(b)(3) of the Immigration and Nationality Act – withholding of removal; withholding of removal under the U.N. Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention).

ON BEHALF OF RESPONDENT:
Juan C. Washington, Esquire
2730 University Boulevard West
Suite 500
Wheaton, MD 20902

ON BEHALF OF DHS:
Christopher Coxe
Assistant Chief Counsel
Baltimore, MD

ORAL DECISION OF THE IMMIGRATION JUDGE

In a decision dated April 23, the year 2003, this Court denied respondent's applications for asylum, withholding under the Act, and withholding under the Torture Convention. In an in-depth decision, this Court set forth *inter alia* 8 reasons why it found that the respondent had not met his burden in establishing past persecution, or that he has a well-founded fear of future persecution should he return to Cameroon at the present time. For reasons set forth in that decision, the Court denied his applications for asylum, finding he had not suffered past persecution, and had no well-founded fear of future persecution. It also denied his applications for relief under INA Section 241(b)(3) and withholding under the Torture Convention.

In a decision dated August 12, 2004, the Board remanded the case to the Court for the Court to make a specific finding, "that the Immigration Judge did not make a specific adverse credibility finding...." It remanded to the Immigration Court to make a specific credibility finding, which this Court is prepared to do at the present time. This Court has reviewed the file, reviewed its decision, and hereby incorporates its decision of April 23, year 2003, into this decision.

Based on the reasoning set forth in that decision, this Court finds, firstly, that the respondent failed to meet his burden in establishing past persecution, or that he has a well-founded fear of future persecution should he return to Cameroon, and, secondly, for the reasons set forth in this decision, to wit the inconsistencies, difficulties with the documents, and improbabilities, this Court, accordingly, makes an adverse credibility finding.

This Court notes, accordingly, that the respondent's application for asylum is denied, and inasmuch as he has failed to satisfy the lower burden of proof required for asylum, it follows that he has failed to satisfy the clear probability standard of eligibility for withholding of removal under INA Section 241(b)(3).

This Court notes, also, that it has entertained an independent review of the respondent's application for relief under the Torture Convention. It finds that the respondent was incredible. It finds as set forth in its decision that the documents submitted by the respondent did not overcome the Court's concerns as to his incredible testimony, and improbable testimony. It notes additionally that documents submitted on Government letterhead were not authenticated pursuant to 8 C.F.R. Section 287.6, and the Court gives them diminimous weight. This Court further notes that any statements that were submitted on behalf of the respondent do not overcome the Court's concerns, and, indeed, does note that there were inconsistencies between some of the statements and the respondent's testimony.

Accordingly, this Court finds the respondent's testimony to be incredible, and finds that the documents he submitted do not overcome the Court's finding of incredibility. This Court makes this finding with reference to both the applications for asylum, withholding under the Act, and withholding under the Torture Convention.

As noted previously in the Court's decision, the respondent is not eligible for the privilege of voluntary departure as he was not physically present in the United States for one year prior to service of the Notice to Appear.

Thus, to reiterate and emphasize pursuant to the Board's remand, this Court does make a specific adverse credibility finding, finding the respondent to be incredible.

Accordingly, the following orders are entered.

ORDERS

IT IS HEREBY ORDERED that the respondent's application for asylum be denied.

IT IS HEREBY ORDERED that the respondent's application for withholding of deportation under INA Section 241(b)(3) be denied.

IT IS HEREBY ORDERED that the respondent's application for relief under the Torture Convention be denied.

IT IS HEREBY ORDERED that the respondent be removed and deported from the United States to Cameroon on the charged contained in the Notice to Appear.

/s/

JILL H. DUFRESNE
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE JILL H. DUFRESE, in the matter of:

JEAN MARC NKEN

A 95 223 548

Baltimore, Maryland

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/

Lois D. Rush, Transcriber

Free State Reporting, Inc.
1324 Cape St. Claire Road
Annapolis, Maryland
21401 (301) 261-1902

January 9, 2006
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.

IMMIGRATION COURT
31 HOPKINS PLAZA, ROOM 440
BALTIMORE, MD 21201

In the Matter of
NKEN, JEAN MARC Case No.: A95-223-548
Respondent IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Mar. 4, 2005.

This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to [Cameroon] or in the alternative to ___________

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to ___________ or in the alternative to ___________

[ ] Respondent's application for voluntary departure was granted until ___________ upon posting a bond in the amount of $___________ with an alternate order of removal to ___________

Respondent's application for:

[X] Asylum was ( ) (X) denied ( ) withdrawn

[X] Withholding of removal was ( ) granted (X) denied ( ) withdrawn

[ ] A Waiver under Section ___ was ( ) granted ( ) denied ( ) withdrawn.

[ ] Cancellation under Section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

Respondent's application for:

[ ] Cancellation under Section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Cancellation under Section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of States under Section ____ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[X] Respondent's application of (X) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted (X) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a __________ until __________.

[ ] As a condition of admission, respondent is to post a $__________ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.
[ ] Other:______________________________
Date: Mar 4, 2005

/s/
JILL H. DUFRESNE
Immigration Judge

Appeal: Waived/Reserved
Appeal Due by: [4/4/05]

ALIEN NUMBER: 95-223-548
ALIEN NAME: NKEN, JEAN MARC

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE: (P) TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [X] INS

DATE: [3/4/05] BY: COURT STAFF: /s/
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

Alien Number: 95-223-548 Alien Name: NKEN, JEAN MARC

LIMITATIONS ON DISCRETIONARY RELIEF FOR FAILURE TO APPEAR

( ) 1. You have been scheduled for a removal hearing, at the time and place set forth on the attached sheet. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A, below) for a period of ten (10) years after the date of entry of the final order of removal.

( ) 2. You have been scheduled for an asylum hearing, at the time and place set forth on the attached notice. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A, below) for a period of ten (10) years from the date of your scheduled hearing.

( ) 3. You have been granted voluntary departure from the United States pursuant to section 240B of the Immigration and Nationality Act, and remaining in the United States beyond the authorized date other than because of exceptional circumstances beyond your control** will result in your being ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A, below) for ten (10) years from the date of the scheduled departure or the date of unlawful reentry, respectively. Your voluntary departure bond, if any, will also be breached. Additionally, if you fail to voluntarily depart the United States within the time period specified, you shall be subject to a civil penalty of not less than $1000 and not more than $5000.

(X) 4. An order of removal has been entered against you. If you fail to appear pursuant to a final order of removal at the time and place ordered by the INS, other than because of exceptional circumstances beyond your control** you will not be eligible for certain forms of relief under the Immigration and Nationality Act (see Section A, below) for ten (10) years after the date you are scheduled to appear.

**the term "exceptional circumstances" refers to circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

A. THE FORMS OF RELIEF FROM REMOVAL FOR WHICH YOU WILL BECOME INELIGIBLE ARE:

1) Voluntary departure as provided for in earlier 240B of the Immigration and Nationality Act;

2) Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act; and

3) Adjustment of status or change of status as provided for in Section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English. Oral notice of the contents of this notice must be given to the alien in his/her native language, or in a language he/she understands by the Immigration Judge.

Date:

Immigration Judge: /s/ or Court Clerk:________

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE: (P) TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [X] INS

DATE: [3/4/05] BY: COURT STAFF: /s/__________
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A95 223 548 - Baltimore Date: June 16, 2006

In re: JEAN MARC NKEN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Juan C. Washington, Esquire

ON BEHALF OF DHS: Arthur H. Gottlieb
Assistance Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States in violation of law

APPLICATION: Asylum; withholding of removal; relief under the Convention Against Torture

This matter was last before the Board on August 12, 2004, when we sustained the respondent's appeal of the Immigration Judge's April 23, 2003, decision and remanded the matter to the Immigration Judge for a specific credibility determination (Exh. R-7). On March 4, 2005, the Immigration Judge found the respondent not credible and again denied his applications for asylum and withholding of removal pursuant to sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1231(b)(3),respectively, and his request for relief under the Convention Against Torture. *See* 8 C.F.R. §§ 1208.16-.18 (2006). The respondent filed a timely appeal[1] of the Immigration Judge's decision, and also submitted a motion to remand in order to apply for adjustment of status based upon a pending visa petition filed on his behalf by his United States citizen wife. The DHS opposes the motion to remand. The respondent's appeal will be dismissed and his motion to remand will be denied.

The respondent argues that the Immigration Judge failed to specifically note the inconsistencies in the respondent's claim and failed to provide legitimate examples supporting an adverse credibility finding (Respondent's NOA at 3). The respondent also argues that his oral and written testimony were internally consistent and that he provided objective evidence supporting his claim for relief (Respondent's NOA at 3). We do not find the Immigration Judge's adverse credibility determination to be clearly erroneous (I.J. at 2-3).[2] *See* 8 C.F.R. § 1003.1(d)(3)(i). For example, the respondent has not made any attempt to address the contradictory evidence of his political activities in Cameroon with respect to his role in a student organization at the University of Yaounde (I.J.'s April 23, 2003, decision at 11-12). Specifically, the respondent never claimed in his asylum application or affidavit that he held a leadership position in his student organization, which advocated for free speech and democracy, although a written statement submitted by his former classmate stated that the respondent was "appointed to the post of Propaganda Delegate and then Secretary General in charge of the Organization" (Exhs. 2, 3, 5-L; I.J.'s April 23, 2003, decision at 4-5, 11-12; Tr. at 60-61). Further, the respondent denied in his testimony that he was ever a secretary general of the organization while in Cameroon (I.J.'s April 23, 2003, decision at 5; Tr. at 60).

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[1] Although the respondent filed a Notice of Appeal of the Immigration Judge's March 4, 2005, decision on March 31, 2005, his February 27, 2006, motion to accept his untimely brief was rejected by the Board on March 21, 2006. Thus, for purposes of the respondent's appeal of the Immigration Judge's decision, we will consider only those arguments attached to his Notice of Appeal (NOA).

In addition, the respondent provided divergent accounts of the events following his release from prison in 1990 given that his affidavit states that he immediately proceeded to his father's house where his brother was waiting for him but testified that he first traveled to his home in Yaounde, where he and his brother lived, and then traveled 300 kilometers to his father's home in Douala by bus (I.J.'s April 23, 2003, decision at 12; Exh. 3; Tr. at 38-39). The respondent also failed to address the Immigration Judge's findings as to why the respondent could not apply for asylum upon reaching the Ivory Coast, and how he could apply for and be granted admission into a university there almost immediately after fleeing Cameroon (I.J.'s April 23, 2003, decision at 11). Similarly, the respondent did not acknowledge the Immigration Judge's observations as to the incorrect spellings and nonsensical statements in the summons that was allegedly issued against him by the Cameroon government (I.J.'s April 23, 2003, decision at 12). Given these and other inconsistencies and implausibilities in the record (I.J.'s April 23, 2003, decision at 11-14; I.J. at 3), we find no clear error in the Immigration Judge's adverse credibility finding. *See Matter of A-S-*, 21 I&N Dec. 1106, 1110 (BIA 1998) (stating while omissions of facts in an asylum application or during testimony might not, by themselves, support an adverse credibility determination, the omission of key events coupled with numerous inconsistencies may provide a specific and cogent reason to support an adverse credibility funding).

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[2] The Immigration Judge's original decision on April 23, 2003, was incorporated into her subsequent decision on March 4, 2005 (I.J. at 2).

Additionally, we agree with the Immigration Judge's conclusion that the respondent has not shown a more likely than not probability of being persecuted upon his return to Cameroon (I.J. at 2-3). *See Matter of R-S-H*, 23 I&N Dec. 629 (BIA 2003). Similarly, we agree with the Immigration Judge's finding that the respondent failed to demonstrate a more likely than not probability of being tortured in

Cameroon (I.J. at 3). *See Matter of G-A-*, 23 I&N Dec. 366 (BIA 2002).

Furthermore, we decline to remand the matter for consideration of the respondent's adjustment of status application (Respondent's Motion at 2-4). Most significantly, the respondent is not prima facie eligible for adjustment of status as he is not a beneficiary of an approved visa petition. *See INS v. Abudu*, 485 U.S. 94 (1988). The respondent concedes that the 1-130 petition filed on his behalf has yet to be adjudicated (Respondent's Motion at 3). As a result, his application for adjustment of status remains incomplete and he therefore cannot qualify for such relief as he has failed to show that a visa is immediately available to him. *See* section 245(a)(3) of the Act, 8 U.S.C. § 1255(a)(3). In addition, although we have previously carved out an exception in *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), to the general rule that aliens in proceedings are not accorded continuances for the resolution of a visa petition, the DHS in this matter has expressed its opposition to the respondent's motion to remand (DHS's Br. at 2). *See Matter of Velarde, supra*, at 256 (holding that a properly filed motion to reopen for adjustment of status based on a marriage entered into after the commencement of proceedings may be granted in the exercise of discretion, notwithstanding the pendency of the visa petition filed on the alien's behalf, where the DHS does not oppose the motion or bases its opposition solely on *Matter of Arthur*, 20 I&N Dec. 475 (BIA 1992)).

Based on the foregoing, we will dismiss the respondent's appeal and deny his motion to remand.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The respondent's motion to remand is denied.

/s/

FOR THE BOARD

U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A95-223-548 - Baltimore Date: Sep. 27, 2006

In re: NKEN, JEAN MARC

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Richey, Ronald D., Esquire

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reopen and reconsider our decision dated June 16, 2006. The respondent has not submitted any material evidence that was previously unavailable nor has he made any arguments that were not already considered in our June 16, 2006, decision. *See* 8 C.F.R. 1003.2. Accordingly, the motion is denied.

/s/
FOR THE BOARD

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JEAN MARC NKEN,

Petitioner,

v.

Alberto R. GONZALES,
U.S. Attorney General,

Respondent.

Appeal No. 06-1784

Submitted: Feb. 21, 2007.
Decided: April 3, 2007.

On Petition for Review of an Order of the Board of Immigration Appeals. (A95-223-548)

Ronald D. Richey, Law Office of Ronald D. Richey, Rockville, Maryland, for Petitioner. Peter D. Keisler, Assistant Attorney General, M. Jocelyn Lopez Wright, Assistant Director, Kathryn L. Moore, Office of Immigration Litigation, United States Department of Justice, Washington, D.C., for Respondent.

Before WILLIAMS, MICHAEL, and KING, Circuit Judges.

Petition denied by unpublished PER CURIAM opinion.

Unpublished opinions are not binding precedent in this circuit. PER CURIAM:

Jean Marc NKEN, a native and citizen of Cameroon, petitions for review of an order of the Board of Immigration Appeals ("Board") Dismissing his appeal from the immigration judge's order denying his applications for asylum, withholding from removal and withholding under the Convention Against Torture ("CAT"). He also seeks review of the denial of his motion to remand. We deny the petition for review.

The Immigration and Naturalization Act (INA) authorizes the Attorney General to confer asylum on any refugee. 8 U.S.C. § 1158(a) (2000). The INA defines a refugee as a person unwilling or unable to return to his native country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (2000). An applicant can establish refugee status based on past persecution in his native country on account of a protected ground. 8 C.F.R. § 1208.13(b)(1) (2006). Without regard to past persecution, an alien can establish a well-founded fear of persecution on a protected ground. *Ngarurih* v. *Ashcroft,* 371 F.3d 182, 187 (4th Cir. 2004).

An applicant has the burden of demonstrating his eligibility for asylum. 8 C.F.R. § 1208.13(a) (2006); *Gandziami-Mickhou v. Gonzales,* 445 F.3d 351, 353 (4th Cir. 2006). A determination regarding eligibility for asylum is affirmed if supported by substantial evidence on the record considered as a whole. *INS v. Elias-Zacarias,* 502 U.S. 478, 481, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992). This court will reverse the Board "only if the evidence presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Rusu v. INS,* 296 F.3d 316, 325 n.14 (4th Cir. 2002) (internal quotation marks and citations omitted).

We conclude that substantial evidence supports both the immigration judge's adverse credibility finding and its ultimate findings that Nken is ineligible for asylum, withholding of removal, and protection under the CAT. Accordingly, we will not disturb the Board's final order affirming the immigration judge's decision.

We also conclude the Board did not abuse its discretion denying Nken's motion to file a brief out of time. With respect to the motion to remand, because Nken did not show that a visa was immediately available to him and the Government opposed the motion, we find the Board did not abuse its discretion denying the motion. *See* U.S.C. § 1255(a) (2000); *Onyeme v. INS,* 146 F.3d 227, 231 (4th Cir. 1998); *Matter of Velarde-Pacheco,* 23 I. & N. Dec. 253 (B.I.A. 2002).

Accordingly, we deny the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED.

C.A.4,2007.
Nken v. Gonzales
227 Fed. Appx. 265, 2007 WL 1037391 (C.A.4)

U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A95 223 548 - Baltimore Date: June 07, 2007

In re: JEAN MARC NKEN

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Ronald D. Richey, Esquire

The Board dismissed the respondent's appeal from an Immigration Judge's decision, and denied his motion to remand, on June 16, 2006. The respondent's motion to reconsider or reopen was denied on September 27, 2006. On December 19, 2006, the respondent filed a motion to reopen, which will be denied,

The motion exceeds the numerical limitations on motions to reopen set by regulation. *See* 8 C.F.R. § 1003.2(c)(2). The general time and number requirements applicable to motions to reopen do not apply in certain circumstances, but none of those circumstances apply in this case. Consequently, the following order will be entered.

ORDER: The motion is denied.

/s/
FOR THE BOARD

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JEAN MARC NKEN,)
)
Petitioner,)
) Appeal No. 07-1633
v.)
)
MICHAEL MUKASEY,)
Attorney General,)
)
Respondent.)
)

Submitted: March 31, 2008.
Decided: April 9, 2008.

On Petition for Review of an Order of the Board of Immigration Appeals. (A95-223-548)

Ronald D. Richey, Law Office of Ronald D. Richey, Rockville, Maryland, for Petitioner. Jeffrey S. Bucholtz, Acting Assistant Attorney General, Michelle G. Latour, Assistant Director, Michele Y.F. Sarko, United States Department of Justice, Washington, D.C., for Respondent.

Before WILKINSON, MOTZ, and KING, Circuit Judges.

Petition denied by unpublished PER CURIAM opinion.

Unpublished opinions are not binding precedent in this circuit. PER CURIAM:

Jean Marc NKEN, a native and citizen of Cameroon, petitions for review of an order of the Board of Immigration Appeals ("Board") denying his motion to reopen his immigration proceedings.

We have reviewed the record and conclude the Board did not abuse its discretion in denying the motion as numerically barred. 8 U.S.C.A. § 1229a(c)(7)(A), (C) (West 2005 & Supp. 2007); 8 C.F.R. § 1003.2(c)(2)(2007), *invalidated on other ground, William v. Gonzales,* 499 F.3d 329, 334 (4th Cir. 2007). We further find that we lack jurisdiction to review Nken's claim that the Board should have exercised it sua sponte power to reopen his proceedings. *See Ali v. Gonzales,* 448 F.3d 515, 518 (2d Cir. 2006) (collecting cases). Accordingly, we deny the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED.

C.A.4, 2008.
Nken v. Mukasey,
273 Fed. Appx. 219, 2008 WL 961628 (C.A.4)

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NON-DETAINED
RESPONDENT

[file stamped May 7, 2008]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
Falls Church, Virginia

In the matter of)
)
)
Jean Marc NKEN) File No.
) A95-223-548
)
)
IN REMOVAL PROCEEDINGS)
)
)

RESPONDENT'S MOTION TO REOPEN (AND REMAND) BASED ON RECENTLY CHANGED COUNTRY CONDITIONS AND NEW EVIDENCE NOT PREVIOUSLY AVAILABLE

Respondent, Jean Marc NKEN, by the through counsel, Ronald D. Richey, hereby moves this Honorable Board of Immigration Appeals (hereinafter "Board") to reopen (and remand) removal proceedings, due to recent change in country conditions and new evidence not previously available, and for cause states:

Brief Summary of Relevant Facts and Procedural History

Respondent Jean Marc NKEN is a national of Cameroon. He is married to an U.S. Citizen and they have a minor U.S. Citizen child.

On April 23, 2003, the Immigration Court issued an written opinion in which it denied Respondent NKEN's applications for political asylum, withholding of removal pursuant to INA §241(b) (3) and protection pursuant to the UNCAT. Respondent NKEN's asylum case is based primarily on his political opposition activities and his political opinions against the dictatorship in Cameroon.

On or about May 16, 2003, Respondent NKEN, through counsel, filed a timely appeal, and, subsequently, a supporting brief with this Honorable Board seeking review of the Immigration Court's denial of his claims of relief.

On August 12, 2004, this Honorable Board remanded Respondent's NKEN's proceedings to the Immigration Court for a specific adverse credibility finding.

On March 4, 2005, the Immigration Judge, without taking any testimony and/or holding a new evidentiary hearing, denied Respondent NKEN's applications for asylum, withholding of removal and protection under the UNCAT and made an adverse credibility finding.

On March 31, 2005, Respondent NKEN filed a timely appeal of the Immigration Court's decision and, subsequently, submitted a motion to remand his case to the Immigration Court so that he could apply for adjustment of status based on a pending immigrant relative (1-130) petition filed on his behalf by his U.S. Citizen spouse, Brigitte Belocck.[1]

On June 16, 2006, this Honorable Board adopted and affirmed the decision of the Immigration Court. Recently, the President of Cameroon for over twenty-five years, Paul Biya, announced that he would change the constitution to permit himself to be a dictator for life. This resulted in major demonstration against the government throughout Cameroon. The repressive government, however, quickly quashed the protests and began rounding up any militants or suspects, including Respondent's brother. (See attached documentation, Exhibits BB, CC and DD.)

ARGUMENT

This motion to reopen should be granted pursuant to INA §240(c)(7) and 8 C.F.R. §1003.2. The motion "shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary materials." INA §240(c)(7)(B). "A motion to reopen shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. §1003.2(c)(1).

---

[1] After a long delay, the USCIS approved the 1-130 Petition on August 22, 2006. (A copy of the 1-130 Approval Notice is attached hereto and made a part hereof as Exhibit AA.)

The present motion is not barred by time and/or numerical limitations, because it is based on **changed county conditions.**

In addition, the new evidence that Respondent NKEN offers is material because it impacts on his credibility and claims for relief, which is determinative in his removal proceedings. Moreover, the enclosures provide new factual evidence based on ecent [sic] events supporting Respondent's well-founded fear of future persecution if removed to Cameroon.

Further, this offered material evidence was not available at the time of the former hearing(s). Notably, this offered evidence describes recent significant new political events in Cameroon.

Specifically, Respondent NKEN presents herewith three significant diverse sets of documents. First, a detailed original letter (with English translation) from Respondent's younger brother, Lucien Nounga, (and the original envelope). (The letter is attached hereto and made a part hereof as Exhibit BB.) This letter is dated March 18, 2008.

The letter describes the recent political unrest in Cameroon caused primarily by President Biya's recent decision to change the constitution of Cameroon to allow him to be president for life, the regime's brutal response, and the recent arrest and detention of Respondent's younger brother. Without a doubt, in any country (especially a so called "democracy" like Cameroon), the changing of the country's constitution to permit the President (of 25 years) to stay in power for life would be considered of such significance to qualify as a change in country conditions. In other words, Paul Biya would do away with elections and the rights of its citizenry to change the government. This would amount to a fundamental change in the government and rights of the citizens of Cameroon. (Our American founding fathers would have found such a tyrannical idea to be totally contrary to the principles of freedom and democracy and reason for revolution.)

Second, Mr. NKEN presents herewith four (4) recent photographs of him and other activists during a political demonstration for "Democracy in Cameroon" in front of the Embassy of Cameroon. (These photographs are attached hereto and made a part hereof as Exhibit CC.) This demonstration was a prompt response to recent arrests, detentions, torture and killings in Cameroon orchestrated by the dictatorial regime of Paul Biya.

Third, Mr. NKEN presents herewith nine recent news-article [sic] from the internet regarding the current political situation in Cameroon and showing that the situation in Cameroon is not safe at all and is likely to become worse in the near future since the Biya regime moves to consolidate power and control, including brutal repression of critics like the Respondent. (These news-articles are attached hereto and made a part hereof as Exhibit DD.)

Therefore, this [sic] a recent and a subsequent development to this Board's last decision. Further, this evidence is material and significant because, inter alia, it corroborates Respondent's fear of persecution and/or torture by the brutal regime in Cameroon. Specifically, the recent changed country conditions and arrests and killings occurring in Cameroon confirm that the police in Cameroon would likely arrest and torture Respondent NKEN, if he returns to Cameroon. This evidence supports his fear of future persecution and confirms his credibility.

Furthermore, in the interests of justice and fairness, this Honorable Board should reopen (and remand) its prior "Decision and Order" and allow Mr. NKEN to present the offered new evidence, to the immigration court, that is material to his claims of relief. Significantly, this Honorable Board may "take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case." 8 C.F.R. § 1003.1(d)(ii). Additionally, this Honorable Board has discretionary equitable powers to serve the interests of justice. See generally *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999) (stating that as long as the Board has jurisdiction, its "discretionary powers are not limited, restricted, or qualified.")

WHEREFORE, for the foregoing reasons and in the interests of fairness and justice, Respondent NKEN respectfully moves this Honorable Board to grant his claim for political asylum, or remand his removal proceedings back to the immigration court in order that he may be permitted to present new material evidence relating to his meritorious applications for asylum, withholding of removal and/or protection under the CAT.

Respectfully submitted,

/s/
Ronald D. Richey
Attorney for Respondent
966 Hungerford Drive, Suite 8A
Rockville, MD 20850
(301) 738-6909901

[Exhibit BB]

[Exhibits AA, CC and DD have been omitted from the printed Joint Appendix]

At Yaounde, on March 18, 2008

Mr. Lucien Nounga
Studies' Director
Bilingual College Seat of Wilstom
BP 14887 Yaounde Cameroon
Phone: (237) 99 95 04 16

Hello Jean Pierre,

How are you? Dear bigbrother [sic] I take advantage of this occasion to write you this letter, because we are passing through hard times at the present in our country as a result of the recent events.

You know since the decease of our father in last September, we are very sad and we are thinking that you are our only hope, our soul. We wish you were here, but the recent events that have hit our country and the repressions which followed, pushed me to ask you not to come back home.

Actually, the protests started with the taxi-drivers' strike because of the high price of gas and which transformed this strike into a social movement, and in about two days the whole country was on fire and the police's repression resulted in 100 deaths. Our capital Yaounde was never like that before. All the stores, the boutiques and all the grocery stores were on fire. I haven't seen something like that before. At our college, by example, where I was (we are on the corner of the Presidential Palace), the Presidential Guard forced everybody to get close by. In that moment the worst thing was that after the President's discourse they started chasing the opponents. The President, himself, in his discourse had accused the opponents manipulating the youths. And you know very well that in our country when the President is speaking his guards start making an excess of zeal It was the same during the press conference of the Minister of the Territorial Administration who accused Mr. John Fru Ndi of being the master-mind of the demonstrations, etc. Jean Michel MINTCHEU who is a provincial of S.D.F. for the Littoral region had his passport retained when he returned from France. They had signals that JM MINTCHEU is a delegate of the S.D.F. for the Littoral region.

The government had tied these demonstrations to the ones which happened in 1990, where the S.D.F. was the promoter. The forces of order started arbitrary arrests in the quarters and all over they received simple denounces. Even myself I was arrested and I was brought to the lake, where the gendarmes were listing all the students from the 1990s and those who were members of the demonstrations. I wouldn't be released if my name was on those lists. This is why I am begging you not to come back to the country, because it is really dangerous for you being one of those with problems from the past. We were told that the S.D.F. was planning to bring in the country foreign people just for vandalism purposes. So dear brother don't make any mistake.

I am sending also to you a newspaper where it is described in detail these events, because I know that you always want proof before you believe.

You know, Jean Mark, that we are orphans and we don't have a mother or father. You are our only bigger brother and our soul and our hope. It is my duty to let you know about all the difficult situations from here in case you want to come back. The President Paul Biya wants to change the constitution in his favor, in order for him to be a candidate in 2011. For that he is ready to crush all the obstacles in front of him and the S.D.F. and its President John FRU NDI are one of them. You understand though why the political police are making all those unjust arrests and incarcerations without judgment and some opponents are even killed. It is true that the political leaders like John FRU NDI can't be arrested very easily, but the militants like you and those who know a lot about the political problems from the past are the ones getting attention. Therefore, there is no question that if you are coming in the country with any pretext your life will be in real danger.

I wish you all the best and take care of yourself.

Your younger brother,
(signature illegible)
Lucien NOUNGA

I certify that I am competent to translate from French into English and from English into French and this is an exact translation of the attached letter in the French language to the best of my abilities.

Name: Manuela Capitanu
Signature: /s/
Date: 04/28/08

U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A95 223 548 Baltimore, MD Date: June 17, 2008

In re: JEAN MARC NKEN

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Ronald D. Richey, Esquire

APPLICATION: Stay of Removal

Counsel for the respondent has applied for a stay of removal pending consideration by the Board of a motion to reopen. After consideration of all information, the Board has concluded that there is little likelihood that the motion will be granted. Accordingly, the request for a stay of removal is denied.

ORDER: The request for stay of removal is denied.

/s/

FOR THE BOARD

U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A95 223 548 - Baltimore, MD Date: June 23, 2008

In re: JEAN MARC NKEN

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Ronald D. Richey, Esquire

ORDER:

PER CURIAM. On May 7, 2008, the respondent, a native and citizen of Cameroon, filed his third motion to reopen since we dismissed his appeal on June 16, 2006. The respondent seeks reopening to afford him the opportunity to reapply for asylum and withholding of removal due to changed country conditions in Cameroon.

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for asylum or withholding of removal and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. *See* section 240(c)(7)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(ii).

In support of his motion, the respondent has proffered three attachments: (1) a letter from his brother in Cameroon dated March 18, 2008, describing the civil unrest that "started with the taxi-cab drivers' strike because of the high price of gas and which transformed this strike into a social movement . . . ."; (2) photos of the respondent allegedly taken at a demonstration in front of the Embassy of Cameroon; and, (3) recent news articles regarding the civil unrest in Cameroon in February and March 2008. *See* Respondent's Motion, Attachments BB, CC and DD.

On review, we find that the respondent has not presented sufficient facts or evidence to establish that his motion falls within the "changed country conditions" exception to the time limitation for motions to reopen set forth at section 240(c)(7)(C)(ii) of the Act. Notably, the respondent has failed to submit his own statement or asylum application articulating his persecution claim based on recent reports of civil unrest in Cameroon. The respondent's failure to set forth his asylum claim based on recent events in Cameroon is significant in this case where the Immigration Judge's adverse credibility determination remains undisturbed. Also, it is well established that tragic and widespread savage violence resulting from civil war or military strife is not persecution. *See generally Sanchez and Escobar*, 19 I&N Dec. 276 (BIA 1985).

The respondent has proffered photos allegedly showing him at a demonstration at the Embassy of Cameroon. However, he fails to provide any details regarding the demonstration such as the date of the demonstration. Nor has he explained how his participation in an event in the United States alters his asylum claim.

According to the proffered news articles, a strike in late February 2008, against rising fuel prices and President Paul Biya's efforts to run for another presidential term in 2011, resulted in riots and clashes between demonstrators and police. The respondent has failed to show how these events alter his persecution claim. The respondent's motion for reopening based on changed country conditions is denied.

The respondent has also submitted evidence to establish that his immediate relative visa petition has been approved and that he and his wife now have a United States citizen child born on March 27, 2007. Essentially, the respondent asks us to reopen these proceedings on our own motion. *See* 8 C.F.R. § 1003.2(a); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (holding that the Board's power to reopen or reconsider cases *sua sponte* is limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations, where enforcing them might result in hardship). The respondent has failed to present exceptional circumstances which would support *sua sponte* reopening under the standards set forth in *Matter of J-J-, supra.* The acquisition of equities in the United States is to be expected when one continues to remain in the United States. Therefore, we do not find that the circumstances warrant the exercise of our limited discretion to reopen *sua sponte*. *See INS v. Doherty*, 502 U.S. 314 (1992) (motions to reopen are especially disfavored in immigration proceedings because every delay works to the advantage of the deportable alien).

Based on the foregoing, the respondent's motion is reopen is denied as time and number barred.

/s/

FOR THE BOARD

FILED: November 5, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1813 (A95-223-548)

JEAN MARC NKEN
Petitioner

v.

MICHAEL B. MUKASEY, Attorney General
Respondent

ORDER

Upon review of submissions relative to the motion for stay pending appeal, the Court denies the motion.

Entered at the direction of Judge Motz with the concurrence of Judge King and Judge Shedd.

For the Court

/s/
Patricia S. Connor, Clerk

PETITIONER'S BRIEF

114

②

No. 08-681

Supreme Court, U.S.
FILED
DEC 19 2008
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

JEAN MARC NKEN,
Petitioner,
v.
MICHAEL MUKASEY,
UNITED STATES ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the decision of a court of appeals to stay an alien's removal pending consideration of the alien's petition for review is governed by the standard set forth in section 242(f)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1252(f)(2), or instead by the traditional test for stays and preliminary injunctive relief.

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OPINION BELOW

The order of the United States Court of Appeals for the Fourth Circuit, denying Petitioner's motion to stay the Board of Immigration Appeals' ("BIA") order of removal pending consideration of his petition for review, is unreported. JA 74. The summary order of the BIA denying Petitioner's Motion to Reopen is unpublished. JA 70-73.

JURISDICTION

The order of the Court of Appeals denying Petitioner's motion to stay the BIA's removal order was entered on November 5, 2008. On November 7, 2008, Petitioner filed an emergency motion in this Court for a stay of removal pending adjudication of the petition for review in the Court of Appeals or, in the alternative, for this Court to treat the motion as a petition for a writ of certiorari and grant Petitioner a stay pending resolution of the petition. On November 25, 2008, this Court granted the application for a stay, ordered the application to be treated as a petition for a writ of certiorari, and granted the petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Immigration and Nationality Act section 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B), provides:

(B) Stay of order

> Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

Immigration and Nationality Act section 242(f), 8 U.S.C. § 1252(f), provides:

(f) Limit on injunctive relief

> **(1) In general**
>
> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.
>
> **(2) Particular cases**
>
> Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

The complete 8 U.S.C. § 1252 is reprinted in the Appendix that follows this brief.

STATEMENT OF THE CASE

Federal courts have historically applied the traditional test for stays to discretionary motions to stay an alien's removal pending appeal. Under that test, four factors are considered: the likelihood of success on the merits, the possibility of irreparable harm, the harm to other parties, and the public interest. A divided Fourth Circuit, in conflict with eight other Courts of Appeals and in concert with only the Eleventh Circuit, recently declared that this traditional rule was overridden by a provision in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, that is titled "Limits on Injunctive Relief" and does not even mention stays.

The decision of the Fourth Circuit cannot be squared with IIRIRA's language, structure, or purpose, all of which support the conclusion that Congress did not intend § 1252(f)(2) to modify the traditional standard for discretionary stays of removal pending appeal. That conclusion is also supported by longstanding precedent of this Court distinguishing between stays and injunctions, and by Congress's own words elsewhere in the U.S. Code – words that demonstrate that when Congress intends to legislate concerning stays, it says so. In § 1252(f)(2), it did not.

Applying § 1252(f)(2) to motions for stays of removal would have grave consequences. Aliens with meritorious claims would be removed to countries where they may face persecution, torture, or death. Both this Court and the Courts of Appeals would lack the discretion to prevent irreparable harm even in the face of irrefutable evidence that such harm will result and even where doing so is undoubtedly in the public interest. This was not Congress's intent, and the Fourth Circuit erred in so holding.

A. Legal Background

Persons who are ordered removed from the United States pursuant to a final order of removal from an Immigration Judge or the Bureau of Immigration Appeals may petition for review of their removal order in the federal Courts of Appeals. *See* 8 U.S.C. § 1252(a); *see also* 8 C.F.R. § 1241.1 (defining a final order of removal).

Prior to 1996, the Immigration & Nationality Act ("INA"), Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. § 1101 *et seq.*), provided in most cases for a mandatory stay of removal (then called "deportation")[1] upon the filing of a petition for review. *See* 8 U.S.C. § 1105a(a)(3) (1994) (repealed). In the small class of cases where stays of deportation were discretionary, courts applied the traditional standard for a stay. *See, e.g.*, *Michael v. INS*, 48 F.3d 657, 664-65 (2d Cir. 1995); *Ignacio v. INS*, 955 F.2d 295, 299 (5th Cir. 1992). Applying that test, courts generally consider four factors in determining whether to grant a stay: likelihood of success on the merits, possibility of irreparable harm, harm to other parties, and the public interest. *See, e.g.*, *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Mohammed v. Reno*, 309 F.3d 95, 100-01 (2d Cir. 2002); *Arnold v. Garlock, Inc.*, 278 F.3d 426, 439 (5th Cir. 2001); *Michael*, 48 F.3d at 664; *Ignacio*, 955 F.2d at 299.

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[1] "Removal" is the term used by Congress in IIRIRA and thereafter to reference what was formerly known as "deportation." *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 34 n.1 (2006).

In 1996, Congress revised the INA when it enacted IIRIRA. As relevant to this case, Congress made three changes to the statutory framework:

First, Congress eliminated automatic stays of removal pending review, providing instead that "[s]ervice of the petition [for review] on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." IIRIRA § 306(a), 110 Stat. 3009-608 (codified at 8 U.S.C. § 1252(b)(3)(B)). Thus IIRIRA rendered all stays of removal discretionary. Congress refrained in § 1252(b)(3)(B) from specifying any change to the relevant legal standard.

Second, Congress repealed the jurisdictional bars to pursuing a petition for review of an order of removal from outside the United States following a petitioner's departure or removal from the country. *See* IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. § 1105a(c) (1994)).

Third, in a separate subsection, Congress added a provision titled "Limits on Injunctive Relief." *See* IIRIRA § 306(a), 110 Stat. 3009-611 (codified at 8 U.S.C. § 1252(f)). By its terms, this provision addresses injunctions, not stays. Section 1252(f)(1) imposes limits on class-wide injunctive relief in cases challenging the new immigration procedures established in IIRIRA. Section 1252(f)(2) imposes limits on injunctive relief in "[p]articular cases." Specifically, § 1252(f)(2) provides:

> Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

Since IIRIRA's enactment, eight circuits have held that the traditional stay standard continues to govern stay of removal orders, notwithstanding § 1252(f)(2). *See Tesfamichael v. Gonzales*, 411 F.3d 169 (5th Cir. 2005); *Hor v. Gonzales*, 400 F.3d 482 (7th Cir. 2005); *Douglas v. Ashcroft*, 374 F.3d 230 (3d Cir. 2004); *Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003); *Mohammed*, 309 F.3d at 98-100; *Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006); *Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001) (en banc); *Lim v. Ashcroft*, 375 F.3d 1011 (10th Cir. 2004) (applying the traditional standard without discussion).

Only the Fourth Circuit and Eleventh Circuit disagree, and those Circuits are sharply divided. *See*

Teshome-Gebreegziabher v. Mukasey, 528 F.3d 330 (4th Cir.), *reh'g en banc denied*, 545 F.3d 285 (4th Cir. 2008); *Weng v. U.S. Att'y Gen.*, 287 F.3d 1335 (11th Cir. 2002). *But see Teshome-Gebreegziabher v. Mukasey*, 545 F.3d 285, 289-90 (4th Cir. 2008) (Michael, J., dissenting from the denial of rehearing en banc, joined by Motz, King, & Gregory, JJ.); *Bonhomme-Ardouin v. U.S. Att'y Gen.*, 291 F.3d 1289, 1290 (11th Cir. 2002) (Barkett, J., concurring, joined by Wilson, J.).

The choice of the proper standard is critical to a petitioner's ability to obtain a stay of his final order of removal: "If the exacting standard of § 1252(f)(2) applies to requests for temporary stays, then to obtain judicial review aliens subject to removal must do more than show a likelihood of success on the merits." *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1305 (2003) (Kennedy, J., in chambers). While stays are certainly not automatic under the traditional standard, *see, e.g.*, *Mohammed*, 309 F.3d at 102-03; *Hor*, 400 F.3d at 485-86; *Andreiu*, 253 F.3d at 484 (denying motions for stays under the traditional standard), those petitioners with a sufficient likelihood of success who can make a showing of irreparable harm may remain in the country until appellate review is complete.

B. Factual Background

1. Petitioner's Initial Asylum Application

Petitioner Jean Marc Nken, a native and citizen of Cameroon, lawfully entered the United States on

April 1, 2001, in transit with authorization to remain for a temporary period. JA 9. He remained thereafter.

In December, 2001, Nken applied for asylum, withholding of removal and protection against removal under the Convention Against Torture. JA 10.

Nken's application set forth the following facts: Nken was arrested twice in Cameroon because of his participation in anti-government protest activities as an influential member of a student organization at the University of Yaoundé. CA App. 214-219.[2] The main subject of these demonstrations was the government's refusal to permit a multi-party, democratic political system in Cameroon.

When he was arrested the first time, he had been participating in a pro-democracy march. CA App. 214. The government detained him for approximately one month in prison, where he was frequently beaten and interrogated about the group sponsoring the march. CA App. 214. After he was released, Nken fled to the Ivory Coast where he continued to participate in activities protesting the treatment of Cameroonians and the absence of fair elections. CA App. 214-216.

Due to violence and political unrest in the Ivory Coast, he left the country in December 2000 to return to Cameroon, where he was arrested immediately upon his arrival at the airport. He was detained again for approximately 30 days, and was again beaten while in custody, interrogated about his political activities opposing the Cameroonian government, and accused of plotting to overthrow the current regime. Upon his release, he departed Cameroon. CA App. 216.

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[2] "CA App." refers to the Joint Appendix filed in the United States Court of Appeals for the Fourth Circuit.

After applying for asylum in the United States, Nken received a removal hearing before the Immigration Judge ("IJ"). During the hearing, the IJ several times had to direct Nken's counsel to lead him through his testimony and admonished him to "move on." CA App. 147-149, 167. When Nken's counsel requested permission to approach Nken in order to authenticate letters from his brother and father, the IJ declined, stating, "It's fine, Mr. Washington. It's been marked into evidence." CA App. 174.

At the close of the hearing, the IJ denied Nken's application. JA 24-26. The IJ found that because the documents submitted in support of the petition were not authenticated, they were subject to "de minimis weight." JA 20. The IJ also stated that the letters from his brother and father were not notarized and faulted Nken for not presenting "proof as to the relationship to his alleged father and brother who wrote letters on his behalf." JA 22.

Nken appealed to the BIA, which, on August 12, 2004, remanded to the IJ to make a specific adverse credibility finding, JA 30-31. On March 4, 2005, the IJ did so based on "improbabilities" and "difficulties with the [Nken's] documents." JA 35. The IJ thus found that Nken failed to carry his burden of proof to establish eligibility for relief and ordered him removed to Cameroon. JA 34-36.

Nken appealed the IJ's remand decision to the BIA on March 31, 2005. His counsel, who longer represents Nken, failed to file his brief in a timely manner and his motion for the BIA to accept it out of time was denied. JA 45 n.1. On June 16, 2006, the BIA affirmed the IJ's decision and issued a final order of removal. JA 44-49.

2. Petitioner's Motion to Reopen Based on His Bona Fide Marriage to a U.S. Citizen and His Approved I-130 Application

During the course of these asylum proceedings, Nken met Brigitte Beloeck, who was then a permanent resident of the United States and is now a U.S. citizen. Nken and Beloeck married on November 4, 2004. They remain married today, and have a child together who is a U.S. citizen. CA App. 619-620.

On November 17, 2004, Beloeck filed an I-130 Petition for Alien Relative on Nken's behalf. CA App. 539-549. She made the application to demonstrate the bona fide nature of Nken's marriage to a U.S. citizen and to seek lawful status for him on that basis. This I-130 petition was still pending at the time the IJ denied Nken's asylum petition on March 4, 2005.

When Nken appealed the IJ's decision to the BIA in March 31, 2005, he also submitted a motion to remand the case to the IJ in order to apply for adjustment of status based on his bona fide marriage to a U.S. citizen. CA App. 504-511. On June 16, 2006, the BIA denied the motion to remand because the Department of Homeland Security ("DHS") had still not yet approved the I-130 petition. JA 44-49.

Nken filed a timely Petition for Review in the United States Court of Appeals for the Fourth Circuit and a motion to reconsider with the BIA. CA App. 587-598. The BIA denied Nken's motion to reconsider on September 27, 2006. JA 50. On April 3, 2007, the Fourth Circuit denied his Petition for Review. JA 51-54.

As these proceedings were ongoing, on August 22, 2006 – nearly two years after it was filed – Nken's I-130 was approved by DHS, affirming that Nken's marriage was bona fide. CA App. 742.

On December 19, 2006, Nken filed a motion with the BIA to reopen proceedings based upon the approved I-130. CA App. 607-730. This motion was denied by the BIA as numerically barred on June 7, 2007. JA 55. On July 5, 2007, Nken filed a Petition for Review in the Fourth Circuit challenging the denial of his motion to reopen, which was denied on April 9, 2008. JA 56-57.

3. Petitioner's Motion to Reopen Based on Changed Country Conditions

In February 2008, Paul Biya, the President of Cameroon, announced that he planned to amend the Cameroonian Constitution to allow him to become a dictator for life. CA App. 756-771. Riots and turmoil ensued in Cameroon in the months that followed. CA App. 756-771.

On May 7, 2008, Nken filed the motion with the BIA that ultimately gave rise to this case. His motion sought to reopen his asylum proceedings based on changed country conditions in Cameroon. He also sought to stay the BIA's final order of removal pending review of his motion to reopen. JA 58-68. In support of his motion to reopen, Nken presented newspaper articles reporting a sharp increase in political unrest in Cameroon and described an emerging pattern of retaliation by the regime against protestors and critics. CA App. 756-771. Nken also submitted photographs of himself at a recent demonstration against the Biya regime at the Cameroonian Embassy. CA App. 751-754. And Nken submitted a detailed letter from his brother in Cameroon which described how Biya was arresting political opponents and stated that Nken's brother had himself been arrested. JA 65-68. According to Nken's brother, Biya's government was inspecting lists of students who had demonstrated against the government in the 1990s, and Nken's name was on those lists. JA 66. The letter warned Nken that "it is really dangerous for you being one of those with problems from the past" and that Nken's "life will be in a real danger" if he returned to Cameroon. JA 66-67.

On June 23, 2008, the BIA denied Nken's motion to reopen on the ground that Nken had failed to present sufficient evidence to establish the existence of changed country conditions. JA 70-73. The BIA did not find the evidence presented by Nken to be lacking credibility or authenticity. Rather, the BIA dismissed the letter by mischaracterizing it as simply "describing the civil unrest that 'started with the taxi-cab drivers' strike because of the high price of gas and which transformed this strike into a social movement.'" JA 71. The BIA concluded that Nken "has failed to show how these events alter his persecution claim." JA 72. The BIA failed to mention or address the parts of the letter warning Nken that the Biya regime was arresting members of its political opposition and that Nken would be in danger if he returned to Cameroon.

In addition, the BIA faulted Nken for not submitting his own statement or asylum application describing why changed conditions in Cameroon entitled him to asylum. According to the BIA, Nken's silence was "[n]otabl[e]" and "significant in this case where the Immigration Judge's adverse credibility determination remains undisturbed." JA 71. Nevertheless, the BIA did not itself make any adverse credibility finding, nor tie the original IJ's credibility finding to the evidence presented in support of the motion to reopen, nor otherwise question the credibility – as opposed to the sufficiency – of the evidence presented by Nken in support of his motion to reopen. Nor did the BIA cite any statute or regulation in support of its apparent requirement that a petitioner submit a personal statement in support of a motion to reopen.

While the above proceedings were ongoing, Nken was arrested outside of his and his family's home for violating the Intensive Supervision and Appearance Program ("ISAP"), which had required Nken to report on a daily basis to the ISAP Office in Baltimore, a drive of several hours to and from his home. First Amended Petition for a Writ of Habeas Corpus at 4-6, *Nken v. Chertoff*, No. 08-cv-1010 (CKK) (D.D.C. filed June 30, 2008). He was placed in detention at the Howard County Detention Center in Jessup, Maryland, where he is currently being held. *Id.* at 4. On June 11, 2008, he was informed by Immigration and Customs Enforcement officials that he would be deported that month. *Id.* at 5. Nken obtained new counsel and filed a Petition for Habeas Corpus, which is pending in the District Court for the District of Columbia, No. 08-cv-1010 (CKK).

On July 23, 2008, Nken filed a Petition for Review in the Fourth Circuit arguing that the BIA abused its discretion by, among other things, failing to evaluate the evidence presented in support of Nken's motion to reopen. CA App. 881-884.

4. Petitioner's Motion to Stay in the Fourth Circuit

On August 6, 2008, Nken filed a motion to stay the BIA's order of removal pending resolution of his petition for review of the BIA's denial of his motion to reopen based on changed country conditions. Nken contended that he was entitled to have his removal order stayed pending appeal under the standard announced by the Fourth Circuit in *Teshome-Gebreegziabher v. Mukasey*, 528 F.3d 330 (4th Cir.), *reh'g en banc denied*, 545 F.3d 285 (4th Cir. 2008). Nken also argued that the Fourth Circuit was wrong to apply § 1252(f)(2) to requests for a stay and that he was entitled to a stay of his final order of removal under the traditional stay standard.

On November 5, 2008, the Fourth Circuit denied Nken's stay motion in a one-sentence order. JA 74.

5. Petitioner's Motion to Stay in this Court

On November 7, 2008, Nken filed an emergency motion in this Court to stay the BIA's removal order pending consideration of his petition for review in the Court of Appeals or, in the alternative, for this Court to treat his motion as a petition for a writ of certiorari, grant the petition, and grant Nken a stay of removal pending resolution of the petition. On November 25, 2008, this Court granted the application for a stay, ordered the application to be treated as a petition for a writ of certiorari, and granted the petition.

SUMMARY OF ARGUMENT

Courts have historically applied the traditional stay standard to discretionary motions to stay a petitioner's final order of removal pending judicial review. This case arises because the Fourth Circuit has interpreted a provision of IIRIRA that does not even use the word "stay" as modifying that traditional standard. The Act's plain text, structure, and legislative history demonstrate that Congress intended no such thing.

By its plain terms, 8 U.S.C. § 1252(f)(2) governs only the standard courts apply when deciding whether to grant an injunction against removal of an alien. But a stay is not an injunction. A stay is directed at a judicial or administrative order, whereas an injunction is directed at a party to litigation. A stay temporarily deprives an order of the force of law pending further proceedings, whereas an injunction requires a person or entity to act or abstain from acting. A court issuing an injunction must specify the precise parties affected and the exact actions prohibited or ordered; no such statement is required in a stay because a stay is not directed at the actions of parties. These distinctions have been recognized repeatedly by courts, including this Court, and by Congress. Applying § 1252(f)(2) to stays would therefore stretch the language of the statute beyond the limits contemplated by Congress.

The structure of IIRIRA confirms that when Congress used the word "enjoin" in § 1252(f)(2), it did not mean "stay." In a separate subsection of IIRIRA, Congress provided that a petition for judicial review of an order of removal does not operate as a "stay" of removal "unless the court orders otherwise." § 1252(b)(3)(B). Thus when Congress wanted to enact legislation governing stays in IIRIRA, it used the word "stay." And when it did so, Congress did not cross-reference the standard for injunctive relief or provide any indication that subsections (b)(3)(B) and (f)(2) ought to be read together. Indeed, IIRIRA applied only one of the two subsections to transitional cases pending at the time of its enactment, implying that they ought not be read in tandem. Moreover, interpreting § 1252(f)(2) to apply to stays would create surplusage in other parts of the statute, including in subsection (f)(1). Section 1252(f)(1) uses the language "enjoin or restrain," whereas subsection (f)(2) uses only "enjoin." "Enjoin" is the term Congress uses to denote permanent relief; "restrain" is the term employed to denote temporary relief. To interpret § 1252(f)(2) to apply to temporary equitable remedies, including stays, would render § 1252(f)(1)'s use of "restrain" superfluous.

The Fourth Circuit's interpretation would also produce results that Congress could not have intended. From a practical standpoint, it would mean that Congress intended to make it more difficult for a court to grant a temporary stay than ultimately to grant the petition and vacate the underlying removal order. The standard in § 1252(f)(2) would limit a petitioner's ability to obtain a stay pending review even where the petitioner is likely to succeed on the merits and may be exposed to dangerous, potentially deadly, conditions if he is removed. Although a stay is hardly automatic under the traditional standard, courts applying the traditional stay standard would not be forced to imperil the lives of petitioners with strong cases and a high risk of irreparable harm because they could consider the equities before sending petitioners in harm's way.

Applying the § 1252(f)(2) standard to stays would also have serious consequences for U.S. citizens who may face removal because of a dispute about their citizenship. If applied to limit the ability of such citizens to obtain a stay, § 1252(f)(2) would render unworkable or inexplicable the procedures set forth in IIRIRA calling for a hearing to adjudicate material disputes of fact about a petitioner's citizenship – a hearing at which the petitioner's presence is necessary.

In the absence of a clear command from Congress, courts should continue to apply the traditional stay standard to determine when to stay a petitioner's order of removal pending judicial review. IIRIRA contains no such clear command, and § 1252(f)(2) may not be read to alter courts' traditional power to stay an order pending appeal.

ARGUMENT

I. THE TEXT OF § 1252(f) DEMONSTRATES THAT CONGRESS DID NOT INTEND IT TO APPLY TO STAYS OF REMOVAL ORDERS PENDING APPEAL.

The power to grant a stay is one of the federal courts' traditional equitable powers. Indeed, it is "a power as old as the judicial system of the nation." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 17 (1942); *see also In re McKenzie*, 180 U.S. 536, 551 (1901). Because "[t]he circumstances surrounding a controversy may change irrevocably during the pendency of an appeal . . . . it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong." *Scripps-Howard Radio*, 316 U.S. at 9 (footnote omitted). "It has always been held, therefore, that, as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." *Id.* at 9-10 (footnote omitted).

The question presented here is whether Congress intended in IIRIRA to displace the federal courts' traditional stay authority in immigration cases. As always, the starting point for statutory interpretation is the statute's plain language. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). And here, that review of the plain language takes place against two settled canons of construction.

First, because of the importance of the courts' traditional stay power, this Court has stated that "Congress would not, without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review." *Scripps-Howard Radio*, 316 U.S. at 11; *see also Miller v. French*, 530 U.S. 327, 340 (2000) (courts "should not construe a statute to displace [their] traditional equitable authority absent the 'clearest command,' or an 'inescapable inference' to the contrary." (citations omitted)).

Second, the burden the government bears in demonstrating a clear statement in the statute is heightened by "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Dada v. Mukasey*, 128

S. Ct. 2307, 2318 (2008) (citations and quotation marks omitted); *INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *INS v. Errico*, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien. . . . [S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." (citation and internal quotation marks omitted)); *Costello v. INS*, 376 U.S. 120, 128 (1964).

Against that backdrop, a straightforward textual analysis demonstrates the error of the Fourth Circuit's approach. The word "stay" does not appear anywhere in the text of 8 U.S.C. § 1252(f)(2). It is undisputed that this provision restricts a court's ability to permanently enjoin the removal of an alien. What is disputed is the Fourth Circuit's conclusion that the use of the term "enjoin" in § 1252(f)(2) encompasses *both* a court's ability to permanently enjoin a petitioner's removal *and* its ability to stay the removal order issued by the BIA or IJ temporarily while appellate review takes place. This reading is contrary to the historical distinction between stays and injunctive relief – a distinction that is reflected in common usage, this Court's jurisprudence, and the statutory text. The text of § 1252(f)(2) thus cannot bear the weight ascribed to it by the Fourth Circuit and Respondent.

A. Section 1252(f)(2), by Its Plain Language, Concerns Only Injunctions, Not Stays.

Section 1252(f)(2) is addressed to injunctions, not stays. The provision uses the word "enjoin," which is simply the verb form of the noun "injunction." *See Black's Law Dictionary* 570 (8th ed. 2004) (defining "enjoin" as "[t]o legally prohibit or restrain by injunction"); *cf. Reno v. Am.-Arab Anti-Discrimination Comm. ("AAADC")*, 525 U.S. 471, 481 (1999) ("By its plain terms, and even by its title, [§ 1252(f)] is nothing more or less than a limit on injunctive relief."). Since a stay is not an injunction, Congress did not intend to modify the standard for stays of removal by use of the term "enjoin" in § 1252(f)(2).

History and common usage establish a formal distinction between stays and injunctions. As Judge Easterbrook explained in a decision rejecting the construction of § 1252(f)(2) advanced by the Fourth Circuit:

> An "injunction" is an order issued as the relief in independent litigation, while a "stay" is an order integral to a system of judicial review: an appellate court may stay a district judge's order, or its own mandate, or an agency's decision when the agency plays the role of the district court and the initial judicial tribunal is a court of appeals.

Hor, 400 F.3d at 484; *see also Tesfamichael*, 411 F.3d at 173-74 ("Though an injunction is relief obtained through independent litigation and directed at a particular party, not a tribunal, a stay is a mechanism intrinsic to judicial review."); *accord Andreiu*, 253 F.3d at 482-83; *cf. Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 381 n.5 (2008) ("A stay is a useful tool for managing the impact of injunctive relief pending further appeal, but once the Court resolves the merits of the appeal, the stay ceases to be relevant."); *Cavel Int'l Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007) (Posner, J.) (noting the "difference between asking a district court for a preliminary injunction and asking a court of appeals for a stay of, or other relief from, the district court's ruling.").

An "injunction" is thus a legal remedy that governs the conduct of a party to a legal proceeding, while a stay is a temporary suspension of a judicial or administrative order independent of the ultimate remedy sought. *Compare Black's Law Dictionary* 800 (8th ed. 2004) (defining "injunction" as "[a] court order commanding or preventing an action."), *and id.* (observing that "[i]n a general sense, every order of a court which commands or forbids is an injunction; but in its accepted legal sense, an injunction is a judicial process or mandate operating *in personam*." (internal quotation marks omitted)), *with id.* at 1453 (defining "stay" as the "postponement or halting of a proceeding, judgment, or the like" and "[a]n order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding"). Because a stay temporarily stops the legal effect of an order, whereas an injunction controls the conduct of a party, a court may stay an injunction, *see, e.g.*, *Lewis* *v. Casey*, 511 U.S. 1066 (1994), but a court does not "enjoin" a stay.

This distinction between a stay and an injunction is a matter of substance, not merely semantics. Different legal rules often apply depending upon whether a judge imposes an injunction or issues a stay. For example, Federal Rule of Civil Procedure 65 provides that "[e]very order granting an injunction and every restraining order must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail . . . *the act or acts restrained or required*." Fed. R. Civ. P. 65(d)(1) (emphasis added) (derived from the Clayton Act, 38 Stat. 738, 28 U.S.C. § 383 (1940) (repealed)). There is no such requirement when a court grants a stay. That makes sense because there is no "act or acts restrained or required" by a stay. As Circuit Justice Rehnquist explained:

> The [Government] contends that since the action of the Court of Appeals [in granting a stay] is equivalent to a preliminary injunction issued by a district court, the Court of Appeals should be required to make the same sort of findings before granting such a stay as are required of a district court by Fed. Rule Civ. Proc. 65. . . . A court in staying the action of a lower court, or of an administrative agency, must take into account factors such as irreparable harm and probability of success on the merits. But in the absence of a statute, rule, or controlling precedent there is no fixed requirement that a court recite the fact that it

> has taken these into consideration, or explain its reason for taking the action which it did.

Coleman v. PACCAR, Inc., 424 U.S. 1301, 1304-05 (1976) (Rehnquist, J., in chambers) (citations omitted).

Stays pending review are governed by Federal Rules of Appellate Procedure 8 and 18, not Rule 65(d) of the Federal Rules of Civil Procedure. Rules 8 and 18 require no description of the "act or acts" stayed. Instead, a party seeking a stay must submit the order being stayed to the reviewing court because the order itself is the subject of the stay. Fed. R. App. P. 8(a)(2)(B)(iii), 18(a)(2)(B)(iii); *cf. In re GTE Serv. Corp.*, 762 F.2d 1024, 1026 (D.C. Cir. 1985) (dismissing petitioners' motion for stay because it was not accompanied by a petition to review the underlying order).

The distinction between stays and injunctions is dispositive in other contexts as well. In *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), this Court concluded that a district court's order staying a lawsuit in favor of parallel state court litigation was not an "injunction" within the meaning of 28 U.S.C. § 1292(a)(1), and was therefore not subject to an interlocutory appeal. Observing that "[a]n order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)," 485 U.S. at 279, the Court overruled a line of cases that had construed stays as injunctions, terming the doctrine "sterile and antiquated." *Id.* at 287.

To be sure, the Court in *Gulfstream* was considering a case in which a court was staying its own procedures. But Justices of this Court have recognized the distinction between stays and injunctions even when the stays applied to judgments of other courts. As Circuit Justice Scalia has explained, stays of lower-court mandates "simply suspend [the lower court's] alteration of the status quo," whereas injunctive relief on appeal "grants judicial intervention that has been withheld by lower courts." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers); *see also Brown v. Gilmore*, 533 U.S. 1301, 1301-02 (2001) (Rehnquist, C.J., in chambers); *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1301 (1993) (Rehnquist, C.J., in chambers) ("[A]pplicants are not merely seeking a stay of a lower court's order, but an injunction against the enforcement of a presumptively valid Act of Congress . . . . By seeking an injunction, applicants request that I issue an order *altering* the legal status quo."). Thus it is well-settled that stays are distinct from, and not merely a subspecies of, injunctions. Because a stay is distinct from an injunction, the issue presented here can be resolved based on the text of § 1252(f)(2), with its solitary use of the term "enjoin."

B. The Stay Sought by Petitioner Is Not an Injunction Within the Meaning of § 1252(f)(2).

Nken does not seek an injunction against a party to the litigation (i.e., the Attorney General). Rather, he seeks to suspend the operation of the BIA's removal order while the Fourth Circuit considers his petition. *See Tesfamichael*, 411 F.3d at 171 (describing the relief sought by aliens in this context as "a stay of their removal order pending review of that order"); *see also Thapa v. Gonzales*, 460 F.3d 323, 329 (2d Cir. 2006) ("[I]n granting a stay . . . . we would be putting a hold on the operation of the order while we reviewed the merits of the underlying petition for review."); *cf. Patel v. Ashcroft*, 378 F.3d 610, 613 (7th Cir. 2004) (Posner, J.) (noting that deportation in violation of a stay was unlawful because "the order of removal was legally infirm" as a result of the stay). Indeed, the jurisdiction of a court of appeals on a petition for review is limited by statute to review of *only* the final order of removal. *See* 8 U.S.C. §§ 1252(a)(1), (a)(5), (b)(9); *see also Obale v. Att'y Gen. of the U.S.*, 453 F.3d 151, 158 & n.6 (3d Cir. 2006).

Because the object of a stay of removal is the final order of removal, it does not fall within the ambit of the term "enjoin" as used in § 1252(f)(2):

> [Petitioner] simply asked us to suspend the operation of her removal order while we considered her petition. If we had agreed to the petitioner's request, a simple stay would have done the job. It would not have been necessary for us to enjoin or restrain the Attorney General of the United States (the named respondent) individually. To turn a stay into an injunction in these circumstances is overkill, and it depreciates the traditional

> force of a simple stay, which assumes automatic respect for our orders without the need for formal restraint or prohibition of individual parties.

Teshome, 545 F.3d at 291 (Michael, J., dissenting from the denial of rehearing en banc).

In reaching a contrary conclusion, the Fourth Circuit relied upon a deceptively simple syllogism. It observed that the stay of the final order of removal prevented the government from deporting the alien, and therefore had the same practical effect as an injunction against removal of the alien. *See Teshome*, 528 F.3d at 333. Accordingly, the Fourth Circuit concluded that the term "enjoin" in § 1252(f)(2) should be construed to also encompass a stay.

The Fourth Circuit's logic does not hold. The mere fact that a stay of a removal order has a practical effect that is similar to that of an injunction against removal does not mean that this Court should interpret the statutory term "enjoin" to mean "stay." *See Hor*, 400 F.3d at 484 ("Certainly there is a functional overlap: a stay, like an injunction, can stop an agency in its tracks, and courts accordingly require the same kind of showing for a stay of an agency's order as for an interlocutory injunction. But the words nonetheless cover different domains." (citation omitted)). *Any* stay of a judgment – whether that judgment is entered by a court or by a quasi-judicial administrative body such as the BIA – will have much the same impact as an injunction against a party enforcing that judgment. Similarly, any stay of a pending proceeding will have much the same impact as an injunction against a party participating in that proceeding. For instance, the stay in *Gulfstream* would have had the same practical effect as an injunction issued to the litigants barring them from pursuing the action. Yet this Court held that the stay was not an "injunction" within the meaning of 28 U.S.C. § 1291, notwithstanding its similar practical consequences. Moreover, under the Fourth Circuit's logic, even the ultimate relief obtained in a successful petition for review would constitute an "injunction" because the vacatur of a BIA order of removal has the practical effect of preventing the BIA from removing someone.

In sum, the fact that a stay and an injunction have a similar effect on an alien's ability to remain in the country does not remotely compel the conclusion that the two terms are interchangeable.

C. Canons of Statutory Construction Require Respect for Congress's Use of the Terms "Stay" and "Enjoin" to Signify Distinct Legal Concepts.

The Fourth Circuit's position that Congress completely revised the traditional standard for granting a "stay" by limiting the courts' power to "enjoin" removal in § 1252(f) is at odds with Congress's careful and repeated separate uses of the terms "stay" and "enjoin," and with traditional canons of statutory construction. *Cardoza-Fonseca*, 480 U.S. at 432 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (bracket in original; quotation marks omitted)); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 454 (2002) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each." (quotation marks omitted)).

The Seventh Circuit noted that "Title 8 as a whole refers to 'stay' 14 times (in the current sense as opposed to 'overstay a visa' and the like) . . . ." *Hor*, 400 F.3d at 485; *see* 8 U.S.C. §§ 1160(d), 1186b(d)(2)(C), 1229a(b)(5)(C), 1229a(c)(7)(C)(iv), 1229c(f), 1231(a)(1)(B)(ii), 1231(c)(2), 1231(c)(2)(A), 1231(c)(2)(B), 1231(c)(2)(C) (word used twice), 1252(b)(3)(B) (same); 1255a(e). By contrast, Title 8 uses the words "enjoin" or "injunction" seven times. *See* 8 U.S.C. §§ 1227(a)(2)(E)(ii), 1252(f)(1) (injunction used in title and enjoin used in subsection), 1252(f)(2) (same), 1324a(f)(2) (injunction used in title and subsection). As Judge Easterbrook concluded for the court in *Hor*, "these words are not treated as coterminous in any provision." 400 F.3d at 485; *see, e.g.*, 8 U.S.C. § 1227(a)(2)(E)(ii) (using the term "enjoined" to refer to injunctive relief in the form of a protective order against domestic violence).

When Congress has taken care in a statutory scheme to use separate terms with distinct meanings, courts should respect the distinctions:

> [T]reating a rule addressed to "injunctions" as covering "stays" would impoverish the

> language and make the legislative task more difficult. Our legal vocabulary contains distinct words for distinctive judicial actions. Keeping them separate makes it easy to address one, both, or neither, in a statute such as the IIRIRA. By contrast, treating a subsection that mentions injunctions but not stays as covering both would force Congress to add provisos each time it sought to regulate one but not the other. Once a legal community develops a stable nomenclature, it is best to apply it mechanically so that no one is taken unawares, and so that drafting can be uncluttered by provisos.

Hor, 400 F.3d at 484; *see also St. Cyr*, 533 U.S. at 312 n.35 ("'[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts . . . the meaning its use will convey to the judicial mind unless otherwise instructed.'" (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952))).

Judge Easterbrook's concern is particularly apt here because ignoring the distinct meanings of the terms "stay" and "enjoin" could have impact far beyond the confines of immigration law. The terms appear throughout the U.S. Code. *Compare, e.g.*, 2 U.S.C. § 922(a) (discussing expedited review where Members of Congress seek "injunctive relief") *with* 2 U.S.C. § 922(b) (stating that no "stay" of an order entered under subsection (a) shall be issued by a single Justice of the Supreme Court); *see also, e.g.*, 12 U.S.C. § 5229(a)(4) (providing that an order granting an "injunction" pursuant to particular sections "shall be automatically stayed" for three days after entry of the order and pending any appeal); 19 U.S.C. § 1516a(g)(4)(H) (prohibiting a single Justice of the Supreme Court from staying an order entered pursuant to subparagraph (A), including an order granting injunctive relief); 7 U.S.C. § 194(h) (providing that a grant of certiorari by the Supreme Court to review an "injunction" entered by a court of appeals to affirm or modify an administrative cease and desist order entered pursuant to section 193 "shall not operate as a stay of the decree of the court of appeals . . . unless so ordered by the Supreme Court"); 18 U.S.C. § 3626(e)(4) (stating that any "order staying, suspending, delaying, or barring" the automatic stay that is otherwise entered when a defendant or intervenor moves to terminate prospective relief ordered in a civil prison conditions case "shall be treated as an order refusing to dissolve or modify an injunction").

The terms likewise appear throughout the Federal Rules. *Compare, e.g.*, Fed. R. App. P. 8(a)(1)(A) (referring to "a stay of the judgment . . . pending appeal"), *and* Fed. R. App. P. 18 (referring to a "stay pending review" of an agency decision), *with* Fed. R. App. P. 8(a)(1)(C) (referring to a court "granting an injunction while an appeal is pending"); *see also* Fed. R. Civ. P. 62(g)(1) ("This rule does not limit the power of the appellate court or one of its judges or justices . . . to stay proceedings – or suspend, modify, restore, or grant an injunction – while an appeal is pending . . . .").

Thus, this Court should reject the Fourth Circuit's conclusion that Congress used "enjoin" as a shorthand way of referring to both stays and injunctions: "Not because Congress is too unpoetic to use synecdoche, but because that literary device is incompatible with the need for precision in legislative drafting." *AAADC*, 525 U.S. at 482.

II. IIRIRA'S STRUCTURE AND LEGISLATIVE HISTORY CONFIRM THAT § 1252(f)(2) DOES NOT APPLY TO STAY OF REMOVAL ORDERS PENDING APPEAL.

A. The Structure of § 1252 and IIRIRA Confirms That Congress Did Not Intend § 1252(f)(2) to Alter the Traditional Stay Standard.

The Fourth Circuit's conclusion that § 1252(f)(2) should be read in conjunction with § 1252(b)(3)(B) to radically alter the traditional standard for a stay pending judicial review is at odds with the structure of IIRIRA. This Court has repeatedly held that the plain meaning of a statutory provision is clarified by examining its context. *See, e.g.*, *Dada*, 128 S. Ct. at 2317. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (citation omitted). The statutory context here forecloses the Fourth Circuit's interpretation of § 1252(f)(2).

First, in § 1252(b)(3)(B), Congress established that stays of removal would be discretionary rather than automatic. Because § 1252(b)(3)(B) deals explicitly with "stays," that section – and not § 1252(f) – "would have been the natural place to locate an amendment to the operative standard governing their issuance" had Congress intended to so provide. *Tesfamichael*, 411 F.3d at 174; *see also Hor*, 400 F.3d at 484 ("It would have been easy to write something like: 'Service of the petition . . . does not stay the removal of an alien pending the court's decision on the petition, unless the court determines that the standards for an injunction under subsection (f)(2) have been satisfied.'"); *Arevalo*, 344 F.3d at 7 n.4, 8; *Mohammed*, 309 F.3d at 99; *Andreiu*, 253 F.3d at 481. Under the Fourth Circuit's approach, by contrast, Congress directly addressed judicial stays in one part of the statute, and then chose to tuck away the pertinent legal standard for such a stay in § 1252(f), a section that does not even include the word "stay." Because Congress clearly knew how to use the term stay, and in fact did so elsewhere in § 1252(b)(3)(B), the Fourth Circuit's approach is, at the very least, "quite strange." *Andreiu*, 253 F.3d at 481.

Second, Congress employed virtually identical language in § 1252(b)(3)(B) that it had used previously to provide for discretionary stays prior to IIRIRA – stays that were adjudicated using the traditional stay standard. Prior to IIRIRA, the filing of a petition for review automatically stayed a petitioner's deportation pending appellate review except in cases involving the deportation of aliens who had committed aggravated felonies. In that category of exceptional cases, the issuance of a stay upon filing of a petition for review was discretionary: the petition's filing did not effect a stay "unless the court otherwise directs." *See* 8 U.S.C. § 1105a(a)(3) (1995) (repealed). The Courts of Appeals uniformly interpreted that provision to mean that the traditional stay standard governed the issuance of a stay. *See, e.g.*, *Michael*, 48 F.3d at 664; *Ignacio*, 955 F.2d at 299. Congress virtually replicated the language of now-repealed § 1105a(a)(3) in the new § 1252(b)(3)(B). By preserving the language that the Courts of Appeals had construed as calling for the traditional stay test, Congress indicated that courts should evaluate stay applications under IIRIRA's new § 1252(b)(3)(B) as they had previously done under § 1105a(a)(3). *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (noting that the Court must "assume that Congress is aware of existing law when it passes legislation"); *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2336 (2008) (same). And had Congress intended to alter that stay standard, it would have done so in a clearer manner than to reproduce the prior language verbatim and insert a provision into a different section of the statute where the word "stay" does not even appear. *Cf. Tai Mui v. Esperdy*, 371 F.2d 772, 777 (2d Cir. 1966) (Friendly, J.) ("[If] Congress had wanted to go that far, presumably it would have known how to say so.").

Third, the Fourth Circuit's insistence that § 1252(b)(3)(B) and § 1252(f)(2) must be read together in determining the standard for a stay is in tension with the special rules Congress adopted to govern stays in "transitional" cases, i.e., cases already initiated when IIRIRA took effect. Section 309(c)(4)(F) of IIRIRA governs stays in such transitional cases, and it does so using the same language that Congress chose in § 1252(b)(3)(B). *See Arevalo*, 344 F.3d at 8. Because new § 1252(f) has no analog in the rules governing transitional cases, the Courts of Appeals have without exception applied the traditional test to stay motions in transitional cases. *See, e.g.*, *Weng*, 287 F.3d at 1339 n.6; *Sofinet v. INS*, 188 F.3d 703, 706 (7th Cir. 1999); *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998). Yet nothing in the statute or legislative history suggests that Congress intended stay motions to be decided using one test for transitional cases and another for cases arising thereafter. Given that the stay-related language is identical in both the transitional and permanent regimes that Congress established, the most logical inference is that Congress meant for the rules governing stays to be identical – and had no intention that those rules would have any relation to new § 1252(f)(2).

Fourth, far from harmonizing the two provisions, the Fourth Circuit's interpretation of § 1252(f)(2) as setting forth the standard for a stay pending appeal renders the explicit stay provision in § 1252(b)(3)(B) mere surplusage. If § 1252(f)(2) set forth the exclusive standard to govern the grant of stays pending appeal – a standard under which stays are anything but automatic – there would have been no need for Congress to specify in § 1252(b)(3)(B) that service of a petition for review would not automatically stay removal.

Likewise, interpreting § 1252(f)(2) to apply to stays and other preliminary relief would render critical terms in § 1252(f) surplusage. *See Arevalo*, 344 F.3d at 7; *Mohammed*, 309 F.3d at 98-99; *Andreiu*, 253 F.3d at 480-81. In particular, § 1252(f)(1) limits the jurisdiction of a court to "enjoin or restrain" the operation of IIRIRA, while § 1252(f)(2) limits the jurisdiction of a court to "enjoin" removal. If "enjoin" were construed as a catch-all for injunctions *and* stays, it would leave "restrain" in 1252(f)(1) without meaning. While a construction that would render the word "restrain" superfluous is to be avoided in any event, it is particularly to be avoided here. That is because the Hobbs Act, on which review of the orders at issue here was modeled, *see* 8 U.S.C. § 1252(a)(1), uses the term "restrain" to denote temporary equitable relief, and the term "enjoin" to denote permanent injunctive relief on the merits. *Compare* 28 U.S.C. § 2349(b) (providing that a court of appeals, in reviewing agency orders, may "restrain or suspend" the order pending determination of the petition for review), *with* 28 U.S.C. § 2349(a) (providing that a court of appeals has jurisdiction to make a judgment "enjoining" or "suspending" an agency order upon the filing of a petition for review). As Judge Selya observed, "The most sensible way to give operative effect to both words in this statutory scheme is to treat the word 'enjoin' as referring to permanent injunctions and the word 'restrain' as referring to temporary injunctive relief (such as a stay)." *Arevalo*, 344 F.3d at 7.

Fifth, it is unnecessary to construe the word "enjoin" in § 1252(f)(2) as applying to stay of removal orders because the provision serves an independent purpose. As Justice Scalia summarized in *AAADC*, § 1252(f) "prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231, but specifies that this ban does not extend to individual cases." 525 U.S. at 481-82. In individual cases, § 1252(f)(2) preserves the ability of courts to grant injunctive relief, but only in the rare instance where it is clear that the petitioner's removal is prohibited as a matter of law. *Hor*, 400 F.3d at 483. Thus "[l]ike the Norris-LaGuardia Act, this enactment curtails resort to a particular remedy – the injunction." *Id.*

The Fourth Circuit and Respondent have suggested that § 1252(f)(2) must be read as applying to stays pending appeal because it would otherwise have no application in any other circumstance. *See Teshome*, 528 F.3d at 334; Resp. Opp. at 18-19. The argument appears to be that the "zipper clause" in 8 U.S.C. § 1252(b)(9), *see AAADC*, 525 U.S. at 483, means that "the *only* way to obtain '[j]udicial review of . . . questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States' is by way of a petition for judicial review of a final order of removal." Resp. Opp. at 18-19 (quoting § 1252(b)(9); bracket in original). Respondent thereby concludes that the question of whether to issue an injunction (as opposed to a stay) would not arise because no court would have jurisdiction in a case seeking such a remedy. *Id.*

But this Court's decisions in *AAADC* and *St. Cyr* underscore why Congress might have felt the need for such a provision for those cases – however exceptional – where neither § 1252(b)(9) nor § 1252(g) would apply to preclude judicial review outside the context of the underlying removal order itself. *See Hor*, 400 F.3d at 483 ("This makes a good deal of sense as long as removal orders may be reviewed in other ways.").

Moreover, accepting this argument would require this Court to conclude that Congress used the word "enjoin" in § 1252(f)(2) not only to include stays, but to be coterminous with the word "stay." That is, if there was no possible application of § 1252(f)(2) other than to a stay pending appeal, then Congress intended "enjoin" in § 1252(f)(2) to mean "stay" and *only* "stay." This interpretation runs contrary to every other definition and use of the term "enjoin" and to the canon of construction that different words in a statute convey different meanings. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006); *Barnhart*, 534 U.S. at 454.

Petitioner's interpretation of the statute therefore ascribes the proper meaning to § 1252(f)(2) that Congress intended, and is the only interpretation consistent with the statute's plain text and purpose, and with the overall structure of IIRIRA.

B. Legislative History Confirms That Congress Did Not Intend § 1252(f)(2) to Set Forth the Standard for Stays.

Nothing in IIRIRA's copious legislative history indicates that Congress intended to alter the traditional standard for stays. *See Andreiu*, 253 F.3d at 481 n.1 (en banc). That omission itself is telling. *See St. Cyr*, 533 U.S. at 320 n.44 ("'In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.'" (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting))).

Subsequent congressional actions confirm what should be inferred from prior legislative history – that Congress intended that courts continue after IIRIRA to apply the traditional discretionary stay standard. Since IIRIRA, Congress has twice rejected amendments that would have modified § 1252(f)(2) to provide that stay motions should be decided under the restrictive standard set forth therein. In considering both the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, and the Comprehensive Immigration Reform Act of 2006 ("CIR"), S. 2611, 109th Cong. (2006) (enacted), Congress rejected amendments that would have modified the extant stay provision in § 1252, i.e., subsection (b)(3)(B), to provide that the standard for stays is governed by the standard for injunctions set forth in § 1252(f)(2). *Compare* REAL ID Act of 2005, H.R. 418, 109th

Cong. § 105(a)(2)(A) (2005) (including, in the version engrossed as passed by the House of Representatives, the proviso "pursuant to subsection (f)" after "unless"), *with* REAL ID Act of 2005, Pub. L. 109-13, § 106 (2005) (omitting such language in the final version); *see also* S. Amdt. 4083, 109th Cong., 2d Sess. (Feingold/Brownback Amendment to the Comprehensive Immigration Reform Act of 2006) (successfully striking provision that would have applied subsection (f) to stays of removal in subsection (b)(3)(B)). These bills were both proposed and rejected *after* multiple courts had held that § 1252(f)(2) was inapplicable to stays.

Had Congress intended to modify the traditional standard for stays of removal pending appeal, it would not have twice rejected amendments that would have achieved that result. *See Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (subsequent action by Congress in declining to adopt new language is "entitled to significant weight" in statutory construction).

III. THE FOURTH CIRCUIT'S CONSTRUCTION OF THE STATUTE WOULD LEAD TO RESULTS THAT ARE AT BEST PECULIAR AND ARBITRARY AND AT WORST ABSURD.

In addition to the myriad textual and structural deficiencies identified above, the Fourth Circuit's construction must be rejected because its reading of § 1252(f)(2) would generate "serious practical problems." *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 35 (2003); *United States* *v. Wilson*, 503 U.S. 329, 334 (1992) (arbitrary results are "not to be presumed lightly").

First, applying § 1252(f)(2) to stays of removal orders pending appeal would in many instances require courts to apply a more stringent standard to provide temporary relief pending appeal than the longer-lasting and more intrusive relief associated with vacating a final order of removal. *Arevalo*, 344 F.3d at 8; *Tesfamichael*, 411 F.3d at 175; *Andreiu*, 253 F.3d at 477. For example, the Courts of Appeals review de novo the BIA's legal determinations – both pure questions of law and applications of law to fact. *See Rranci v. Att'y Gen. of the U.S.*, 540 F.3d 165, 171 (3d Cir. 2008); *Andreiu*, 253 F.3d at 477. In cases raising legal questions, the court would have to answer those questions "by clear and convincing evidence" based only on a stay motion and solely for the purpose of placing the removal order on temporary hold. *Tesfamichael*, 411 F.3d at 175. Where the question raised is one of first impression, applying § 1252(f)(2) would foreclose a stay completely if the answer is not "clear and convincing" at the stay stage. *See Weng*, 287 F.3d at 1340; *Andreiu*, 253 F.3d at 482. In those rare cases where a stay was granted, applying the § 1252(f)(2) standard to stay motions would render a merits hearing superfluous because the stay decision would "essentially duplicate the decision on the merits." *Id.* Application of the § 1252(f)(2) standard to stays thus "creates a severe anomaly." *Arevalo*, 344 F.3d at 8. This "Kafkaesque design" is at the very least "counterintuitive" and "peculiar." *Id.*

More importantly, however, where a stay was denied under § 1252(f)(2) but the petitioner had both a high likelihood of success on the merits and faced certain or near-certain irreparable harm if removed, application of the § 1252(f)(2) standard would be absurd. *See id.* Application of this standard to stay motions would severely restrict the equitable authority of the courts (including this Court) to stay potentially – and even likely – erroneous orders of removal. Judge Easterbrook has suggested that "removal is 'prohibited by law' only when the person is a citizen of the United States or holds a visa of unquestioned validity," *Hor*, 400 F.3d at 483, or is "[a] diplomat, or an alien who prevailed before the Board but was threatened by a rogue subordinate who refused to acknowledge the Board's authority," *id.* The "clear and convincing evidence" standard thus "would effectively require the automatic deportation of large numbers of people with meritorious claims," *Andreiu*, 253 F.3d at 482, and with severe consequences – including loss of fundamental liberties and even lives. *See Lanza v. Ashcroft*, 389 F.3d 917, 927-28 (9th Cir. 2004); *Jordan v. De George*, 341 U.S. 223, 231 (1951). And while these petitioners technically are entitled to return should they prevail on the merits of their petitions for review, "[t]he ability to come back to the United States would not be worth much if the alien has been maimed or murdered in the interim." *Hor*, 400 F.3d at 485. Yet under the Fourth Circuit's reading of § 1252(f)(2), there is no mechanism to prevent that result. The notion that Congress intended to send away petitioners with a high likelihood of success on the merits and a high or even certain risk of irreparable harm based on their failure to meet a much higher standard than that required for relief on the merits – and before they have ever had an opportunity to brief their cases in full – is absurd.

Nor should there be any doubt that a great many petitioners who have been ordered removed will ultimately succeed on the merits of their petitions for review. As Judge Posner has observed, "adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice." *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005); *id.* at 829 (noting that panels of the Seventh Circuit reversed the BIA "in a staggering 40 percent" of petitions resolved on the merits and that "[o]ur criticisms of the Board and of the immigration judges have frequently been severe"). Numerous other judges have expressed similar chagrin and dismay at the frequency of arbitrary and capricious review in the immigration courts. *See, e.g.*, *Zuh v. Mukasey*, 547 F.3d 504, 513-15 (4th Cir. 2008) (noting "increasingly strident . . . criticisms of the immigration review process" and "add[ing] to this rising tide of criticism"); *N'Diom v. Gonzales*, 442 F.3d 494, 500-01 (6th Cir. 2006) (Martin, J., concurring) (describing "the significantly increasing rate at which adjudication lacking in reason, logic, and effort from . . . immigration courts is reaching the federal circuits"); *see also* U.S. Gov. Accountability Office, GAO-08-940, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges* 7-9

(2008); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007); Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 Geo. Immigr. L.J. 1, 11-36 (2006); ABA Commission on Immigration Policy, Practice & Pro Bono, *Dorsey & Whitney Study of Board of Immigration Appeals: Procedural Reforms to Improve Case Management* 40-47 (2003), available at http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf.

In short, application of § 1252(f)(2)'s "exacting standard" could "impede access to the courts in meritorious cases," causing substantial harm to petitioners and calling into question "the legitimacy and public acceptance" of the statutory regime. *Kenyeres*, 538 U.S. at 1305 (Kennedy, J., in chambers). The consequences of doing so are particularly egregious "in the immigration context, where seekers of asylum and refugees from persecution expect to be treated in accordance with the rule-of-law principles often absent in the countries they have escaped." *Id.* Nothing in the plain text or legislative history of IIRIRA suggests that this was Congress's intent.

Finally, because the Fourth Circuit's interpretation of § 1252(f)(2) is not limited to asylum claims, it would apply to a host of other claims, including, in particular, to a claim that removal is unlawful because the petitioner is a U.S. citizen. The Fourth Circuit's reading would frustrate the statutory scheme Congress put in place in IIRIRA for assessing claims of U.S. citizenship.

Under § 1252(b)(5), if a petitioner claims to be a U.S. citizen and there exists a genuine issue of material fact about his nationality (and thus some likelihood of success), the court of appeals must transfer the proceeding to the district court for a hearing on the claim pursuant to 28 U.S.C. § 2201. Such a hearing is, in fact, constitutionally compelled. *See Agosto v. INS*, 436 U.S. 748, 753 (1978); *accord Ng Fung Ho v. White*, 259 U.S. 276 (1922). The burden of proof at such a hearing would not be clear and convincing evidence, but rather a mere preponderance of the evidence. *See Leal Santos v. Mukasey*, 516 F.3d 1, 4 (1st Cir.), *cert. denied*, 129 S. Ct. 73 (2008); *Patel v. Rice*, 403 F. Supp. 2d 560, 561 (N.D. Tex. 2005), *aff'd*, 224 F. App'x 414 (5th Cir. 2007) (unpublished table decision), *cert. denied*, 128 S. Ct. 1217 (2008).

Under the Fourth Circuit's reading of § 1252(f)(2), however, that citizen could be removed prior to his citizenship hearing if he could not meet the clear and convincing evidence burden at the stay stage – notwithstanding his likelihood of success and the obvious equities counseling against deportation of a likely U.S. citizen with an appeal pending. Although in theory the hearing could proceed without the presence of the citizen, doing so would raise serious due process concerns. *See Agosto*, 436 U.S. at 756-57. And in any event, the purported citizen's presence and testimony at the hearing would be critical to assess credibility, introduce evidence, and ensure that U.S. citizens are not erroneously deported. *See id.* at 757 ("[I]t is only when the witnesses are present and subject to crossexamination that their credibility and the weight to be given their testimony can be appraised." (quotation marks omitted)). Congress could not have intended that § 1252(f)(2) would permit removal of a purported U.S. citizen before his congressionally-mandated district court hearing.

Given these consequences and the absence of any clear indication to the contrary, this Court should not interpret the word "enjoin" to displace the traditional stay standard and restrict the stay power that has always been employed by federal courts – including this Court – in the administration of justice.

CONCLUSION

The Court should maintain the stay that it ordered on November 25, 2008, or in the alternative, should vacate the Fourth Circuit's order denying Nken's motion to stay his final order of removal and remand for reconsideration of his motion under the proper, traditional standard for stays.

Respectfully submitted,

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APPENDIX

Appendix

8 U.S.C. § 1252

§ 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1) of this title

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review--

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)--

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to section 1252(b)(4)(B) of this title, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that--

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of Title 28, United States Code.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

(8) Construction

This subsection--

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal--

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the

---

[1] See References in Text note under this section.

name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if--

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may--

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of--

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of--

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner--

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1) of this section.

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant

Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
JAN 7 - 2009
OFFICE OF THE CLERK

(5)

No. 08-681

In the Supreme Court of the United States

JEAN MARC NKEN, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The question presented as formulated by this Court is:

Whether the decision of a court of appeals to stay an alien's removal pending consideration of the alien's petition for review is governed by the standard set forth in Section 242(f)(2) of the Immigration and Nationality Act, 8 U.S.C. 1252(f)(2), or instead by the traditional test for stays and preliminary injunctive relief.

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In the Supreme Court of the United States

No. 08-681

JEAN MARC NKEN, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The order of the court of appeals denying petitioner's motion for a stay of removal (J.A. 74) is unreported. The decisions of the Board of Immigration Appeals denying petitioner's stay motion (J.A. 69) and motion to reopen (J.A. 70-73) are unreported.

JURISDICTION

The order of the court of appeals was entered on November 5, 2008. The application for a stay of removal was filed in this Court on November 7, 2008. On November 25, 2008, the Court granted the application, treated it as a petition for a writ of certiorari, and granted the petition. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-16a.

STATEMENT

Petitioner is a citizen of Cameroon who entered the United States on a transit visa in 2001 and has remained here without authorization ever since. He claims that he will be persecuted if returned to Cameroon because he participated in a political demonstration in 1990. An immigration judge (IJ) determined that petitioner was not credible and denied relief, the Board of Immigration Appeals (Board) affirmed, and the court of appeals denied his petition for review.

Petitioner then filed three successive motions to reopen his case. In the third motion, he attempts to revive his claim of persecution based on changed country conditions in Cameroon. The Board denied the motion and denied petitioner's accompanying motion for a stay of removal. The court of appeals denied petitioner's motion to stay his removal pending judicial review. Petitioner now contends that the court used the incorrect standard in evaluating his stay motion.

1. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to streamline judicial review of aliens' claims and expedite the removal of illegal aliens from the United States. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. IIRIRA made three amendments to the INA that are particularly relevant here.

First, IIRIRA modified a provision of the INA that previously had provided for an automatic stay of the enforcement of a removal order upon the filing of a petition for review in a court of appeals. As a result, the INA now provides that "[s]ervice of the petition [for judicial review] * * * *does not* stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." IIRIRA § 306(a)(2), 110 Stat. 3009-608 (emphasis added) (enacting 8 U.S.C. 1252(b)(3)(B)).

Second, Congress repealed a provision of the INA that had barred further consideration of a petition for review following an alien's departure or removal from the United States. IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)). Post-IIRIRA, therefore, "an alien may continue to prosecute his appeal of a final order of removal even after he departs the United States." *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 192 (4th Cir. 2004); see *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2320 (2008).

Third, Congress enacted a new provision, which states that "no court shall enjoin the removal of any alien pursuant to a final order under [8 U.S.C. 1252] unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." IIRIRA § 306(a)(2), 110 Stat. 3009-612 (enacting 8 U.S.C. 1252(f)(2)). That provision is at issue here.

2. a. Petitioner is a native and citizen of Cameroon who entered the United States in 2001 on a transit visa. J.A. 9. He overstayed his visa and was charged with being removable from the United States. J.A. 8-9; see 8 U.S.C. 1227(a)(1)(B).

Petitioner conceded that he was removable but sought asylum. J.A. 9-10. He contended that he would be persecuted if returned to Cameroon because he had participated in a student demonstration against the government in 1990. A.R. 826-831. He stated that he left Cameroon shortly after the demonstration and spent the following decade attending school in the Ivory Coast. A.R. 826-828. He claimed that when he returned to Cameroon in 2000, he was arrested, jailed for one month, and released. A.R. 828. Petitioner then traveled to the Bahamas to attend a medical conference, remained there for about two months, entered the United States en route home to Cameroon, and decided to remain here. *Ibid.*; see J.A. 11.

The IJ deemed petitioner's asylum application to also encompass requests for withholding of removal and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. J.A. 9-10. The IJ held a hearing on those claims, at which petitioner testified. A.R. 570-634.

b. The IJ determined that petitioner was removable as charged and denied his claims for asylum, withholding of removal, and CAT protection. J.A. 8-23. She found petitioner's story about why he left Cameroon in 1990 "improbable," J.A. 18; "question[ed]" petitioner's account of his arrest when he returned to Cameroon in 2000, J.A. 20; noted that petitioner's answers to various questions were "vague[]" and "evasive[]," J.A. 20-21; and "doubt[ed] that [petitioner] was being totally forthcoming with the Court," J.A. 21.

In particular, the IJ explained that petitioner's claim that he fled Cameroon in 1990 because of fear of persecution was undermined by the fact that he never sought asylum in the Ivory Coast and appeared to have previously arranged to attend school there. J.A. 18-19. The IJ also determined that petitioner provided incomplete and conflicting testimony about how he supported himself in the Ivory Coast, and that his account of his 2000 arrest was not believable. J.A. 20-22. The IJ noted numerous discrepancies between petitioner's initial asylum application and his amended application and testimony, such as his testimony regarding the role he played in the 1990 student demonstration. J.A. 19. The IJ also stated that various letters that petitioner claimed to have been written by his father and brother could not be authenticated because petitioner "presented no proof as to [his] relationship" with those individuals. J.A. 22.

c. The Board remanded petitioner's case to the IJ, J.A. 30-31, because although the IJ had "raised numerous problems relating to [petitioner's] credibility," she had not "ma[de] a specific adverse credibility finding," J.A. 31. On remand, the IJ made an adverse credibility finding and denied petitioner's claims. J.A. 32-37. The IJ incorporated her prior decision, observing that petitioner's testimony was "incredible," "improbable," and riddled with inconsistencies. J.A. 34-36.

d. Petitioner appealed to the Board, then filed a motion to remand his case so that he could seek adjustment of status based on his marriage to a United States citizen. A.R. 314-317, 364-367. The Board affirmed the IJ's denial of relief. J.A. 44-49. It upheld the IJ's adverse credibility finding, explaining that petitioner "ha[d] not made any attempt to address the contradictory evidence of his political activities in Cameroon" in 1990, J.A. 46; had "provided divergent accounts of the events following his release from prison in 1990," *ibid.*; had "failed to address" why he never sought asylum in the Ivory Coast and how he was able to immediately begin studies when he arrived there, J.A. 47; and had submitted purportedly official documents with "incorrect spellings and nonsensical statements," *ibid.* See J.A. 47-48 (summarizing "inconsistencies and implausibilities in the record"). The Board also denied petitioner's remand motion, explaining that petitioner was not eligible to adjust his status because the relative visa petition filed on his behalf had not been approved. J.A. 48; see 8 U.S.C. 1255(a) (alien is not eligible to adjust status unless "an immigrant visa is immediately available to him").

Petitioner filed a motion to reopen his case, asking the Board to reconsider its decision. A.R. 284-289. The Board denied the motion because petitioner had not "submitted any material evidence that was previously unavailable" or "made any arguments that were not already considered." J.A. 50.

e. The court of appeals denied petitioner's petition for review. J.A. 51-54. It concluded that "substantial evidence support[ed] both the immigration judge's adverse credibility finding and [her] ultimate findings that [petitioner] is ineligible for asylum, withholding of removal, and protection under the CAT." J.A. 53. The court also concluded that the Board appropriately denied petitioner's remand motion because petitioner was ineligible to adjust his status. *Ibid.*

3. While his petition for review was pending, petitioner filed a second motion to reopen his case, A.R. 155-160, in which he sought to adjust his status because the visa petition had been approved, A.R. 156. The Board denied the motion, explaining that petitioner had "exceed[ed] the numerical limitations on motions to reopen," and none of the exceptions to the rule that an alien may only file one motion to reopen applied. J.A. 55 (citing 8 C.F.R. 1003.2(c)(2)).

The court of appeals denied petitioner's petition for review, concluding that the Board had not abused its discretion in denying the motion to reopen. J.A. 56-57.

4. Petitioner then filed a third motion to reopen his case, J.A. 58-64, seeking to renew his asylum claim based on changed country conditions in Cameroon, J.A. 61. He argued that he would be persecuted if returned to Cameroon, based on his political activities almost two decades ago, because the Cameroonian president, who had already been in power for over twenty-five years, stated his intention to amend the constitution to be president for life. J.A. 60-61. Petitioner attached a letter that he claimed was from his brother, J.A. 65-68; undated photos of himself allegedly taken at a demonstration in front of the Embassy of Cameroon, A.R. 123-126; and recent news articles about civil unrest in Cameroon, A.R. 128-143. Petitioner also sought reopening to adjust his status, even though the Board had twice rejected that request. J.A. 63.[1]

The Board denied the motion to reopen. J.A. 70-73. It acknowledged that the statutory limitations on motions to reopen do not apply if the alien seeks asylum or withholding "based on changed country conditions" and presents "evidence [that] is material and was not available and could not have been discovered or presented" before. J.A. 70; see 8 U.S.C. 1229a(c)(7)(C)(ii); 8 C.F.R. 1003.2(c)(3)(ii). But the Board determined that petitioner had failed to demonstrate changed country conditions. J.A. 71. The Board observed that petitioner "failed to submit his own statement or asylum application articulating his persecution claim based on recent reports of civil unrest in Cameroon," and found that failure "significant in this case" because the agency had already determined that petitioner was not credible. *Ibid.* The Board also noted that petitioner "fail[ed] to provide any details" regarding the photographs he submitted; any discussion of "how his participation in an event in the United States alters his asylum claim"; and any explanation of how civil unrest in Cameroon altered his claim in light of the rule that civil unrest alone does not establish persecution. J.A. 71-72. The Board also declined to reopen petitioner's proceedings sua sponte to permit him to adjust his status, because petitioner failed to demonstrate the "exceptional circumstances" that would justify reconsidering his claim. J.A. 72.

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[1] Petitioner also sought a stay of removal. A.R. 8-13. The Board denied that motion, explaining that "there [wa]s little likelihood that the motion [to reopen] w[ould] be granted." J.A. 69.

5. After filing his third motion to reopen but before the Board's decision, petitioner sought habeas corpus relief in district court. See 08-01010 Emergency Pet. for a Writ of Habeas Corpus (D.D.C. June 13, 2008) (Habeas Pet.). He sought to relitigate the claims the Board had rejected, and he asked the district court to enter an injunction forbidding "the United States and all of its officers" from removing him from the United States while his motion to reopen was pending. Habeas Pet. 1-2, 18. The district court denied the petition "insofar as it requests injunctive relief in the form of a stay of [p]etitioner's impending removal from the United States." 08-01010 Order (D.D.C. June 18, 2008).[2]

6. Petitioner filed a petition for review of the Board's denial of reopening and sought a stay of removal from the court of appeals. He argued that he was entitled to a stay under both the standard contained in

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[2] The United States has moved to dismiss the remainder of the petition for lack of jurisdiction, see 08-01010 Mot. to Dismiss (D.D.C. July 29, 2008), and that motion is pending.

8 U.S.C. 1252(f)(2) and under the four-part standard for preliminary injunctive relief. 08-1313 Pet. C.A. Stay Mot. 6-17. The government opposed that motion, explaining that the Section 1252(f)(2) standard applied under *Teshome-Gebreegziabher* v. *Mukasey*, 528 F.3d 330, 331 (4th Cir. 2008), and that petitioner did not meet that standard. 08-1313 Gov't C.A. Stay Opp. 7-11.

The court of appeals denied petitioner's stay application in an unpublished order. J.A. 74.

SUMMARY OF ARGUMENT

I. Petitioner's request for a court order preventing the Executive Branch from carrying out a final order of removal should be evaluated using the standard in 8 U.S.C. 1252(f)(2).

A. By its plain terms, Section 1252(f)(2) applies to any court order that would "enjoin" an individual alien's removal. That is precisely the relief petitioner seeks. An injunction is a court order prohibiting a person from taking, or requiring a person to take, a specified act. In his stay motion, petitioner asked the court of appeals to enter an order preventing Executive Branch officials from removing him, even though they have full authority to do so. Such an order would "enjoin the removal of any alien," and Section 1252(f)(2) therefore applies. Petitioner's insistence that he seeks a "stay" does not warrant a different conclusion, both because a stay is a type of injunction, and because an order preventing removal of an alien is naturally termed an injunction.

B. The statutory context confirms that Section 1252(f)(2) applies to requests for stays of removal. That provision is located within Section 1252, which comprehensively regulates judicial review of final orders of removal. It is preceded by Section 1252(b)(3)(B), which states, as a procedural matter, that the filing of a petition for review does not automatically stay removal. And it is part of Section 1252(f), which provides in broad terms both that aliens may not obtain class-wide relief to enjoin operation of the immigration laws, 8 U.S.C. 1252(f)(1), and that individual aliens are limited in obtaining injunctive relief to avoid removal, 8 U.S.C. 1252(f)(2). Petitioner's interpretation gives no meaning to Section 1252(f)(2), and it therefore should be rejected.

C. The drafting history confirms that Section 1252(f)(2) applies here. In IIRIRA, Congress amended the INA to streamline judicial review and expedite the removal of illegal aliens. Congress shifted from the pre-IIRIRA scheme, under which most aliens were permitted to remain in the United States pending judicial review, to a new scheme whereby most aliens would be required to pursue their claims from their home countries. Section 1252(f)(2) is an important part of that effort, because it heightens the standard that must be met for a court to allow an alien to stay in the United States pending judicial review.

D. Applying the Section 1252(f)(2) standard to stays of removal furthers Congress's purposes in enacting IIRIRA. Congress made the policy judgment that when an alien's claims have twice been rejected by the agency, that alien should not be permitted to remain in the United States pending further review. As this case amply demonstrates, there are many ways in which aliens with non-meritorious claims may seek to manipulate the judicial system to delay their removal. Section 1252(f)(2) serves to discourage such actions.

E. No canon of statutory interpretation overrides the clear import of Section 1252(f)(2). The choice of one stay standard over another does not raise any Suspension Clause concerns, and this is not a context in which Congress would have wished an ambiguity to be resolved in favor of an alien.

II. Even if this Court concludes that the standard in Section 1252(f)(2) does not apply, it should affirm the denial of petitioner's motion because petitioner cannot prevail even under the traditional test for preliminary injunctive relief. Petitioner advocates a watered-down version of the four-part standard for preliminary injunctive relief. This Court therefore should reiterate that the four-part standard requires a likelihood (not a possibility) of success on the merits and irreparable injury and that there are significant public burdens attendant to permitting an illegal alien to remain in the United States. Under a proper application of that standard, petitioner is not entitled to a stay.

ARGUMENT

I. SECTION 1252(f)(2) GOVERNS WHETHER A COURT OF APPEALS SHOULD BAR AN ALIEN'S REMOVAL PENDING CONSIDERATION OF HIS PETITION FOR REVIEW

A. The Text Of Section 1252(f)(2) Plainly Provides The Standard For Evaluating A Motion To Bar Removal Pending Judicial Review

As in any case of statutory construction, this Court's analysis "begins with the language of the statute." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). At issue here is 8 U.S.C. 1252(f)(2), which states: "Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." The question is whether Section 1252(f)(2) provides the standard for a court of appeals to use when an alien seeks to prevent the Executive Branch from removing him while his petition for review is pending. The answer is yes. That is because Section 1252(f)(2) uses broad language, including the expansive term "enjoin," to encompass any effort by the courts to prevent the Executive Branch from executing a final order of removal.

1. As an initial matter, the comprehensive language Congress used in Section 1252(f)(2) demonstrates that the provision applies broadly to any judicial order that would have the effect of preventing any alien's removal. The introductory clause—"[n]otwithstanding any other provision of law," 8 U.S.C. 1252(f)(2)—establishes that Section 1252(f)(2) supersedes all other statutory provisions that might apply to efforts by aliens to forestall their removal. See *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10, 18 (1993). Congress provided a mandatory prohibition on the courts, stating in plain terms that "no court shall" enjoin an alien's removal unless a certain standard is met. 8 U.S.C. 1252(f)(2). Congress then applied that prohibition to "the removal of *any* alien." *Ibid.* (emphasis added). "[T]he word 'any' has an expansive meaning." *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 835-836 (2008). Here, it demonstrates that Section 1252(f)(2) applies to all aliens who ask the courts to prevent their removal. Finally, Congress provided a narrow exception to its general prohibition, providing that a court may enjoin execution of a removal order if the alien "shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." 8 U.S.C. 1252(f)(2). Taken together, those provisions make plain Congress's intention to per-

mit a reviewing court to enjoin the execution of a removal order only in limited circumstances.

The remaining question, then, is whether a court order precluding Executive Branch officials from executing a final order of removal is an order "enjoin[ing] the removal" of the alien. 8 U.S.C. 1252(f)(2). The term "enjoin" is not defined in Section 1252(f)(2) or elsewhere in the INA, and it therefore should be given its ordinary meaning. See, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994). In its customary usage, "enjoin" means to "require," "command," or "direct" an action, or to "require a person * * * to perform, or to abstain or desist from, some act." *Black's Law Dictionary* 529 (6th ed. 1990) (*Black's*). Accordingly, an "injunction" is "[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury." *Id.* at 784. See, *e.g.*, *Webster's Third New International Dictionary of the English Language* 754 (1993) ("enjoin" is "to direct, prescribe, or impose by order"; "to prohibit or restrain by a judicial order or decree"); *id.* at 1164 (an "injunction" is "the act or an instance of enjoining"; "an equitable writ * * * whereby one is required to do or refrain from doing a specified act").

When an alien subject to a final order of removal seeks an order barring Executive officers from removing him while his petition for review is pending, he is seeking to "enjoin" his removal. That is because a judicially granted stay of removal "require[s]" DHS to "abstain" from doing "some act," *Black's* 529, *i.e.*, the act of "remov[ing] * * * [the] alien pursuant to a final order" of removal, 8 U.S.C. 1252(f)(2). Here, petitioner seeks to remain in the United States while the court of appeals considers his challenge to the Board's denial of his third motion to reopen. Pet. C.A. Stay Mot. 1. Because his removal order has long been final, that can only be accomplished through a court order barring DHS from removing him. Petitioner therefore seeks to "enjoin" his removal, and the Section 1252(f)(2) standard applies.

2. Petitioner contends (Br. 20-28) that Section 1252(f)(2) is inapplicable because he seeks a "stay," which in his view is fundamentally different from an injunction. He is mistaken, both because a stay is a type of injunction, and because the relief petitioner seeks is naturally characterized as an injunction.

In ordinary usage, a "stay" is "[a] stopping"; an "act of arresting a judicial proceeding by the order of a court"; or "a suspension of the case or some designated proceedings within it." *Black's* 1413. A stay is "a kind of injunction," because a court entering a stay directs judicial proceedings to be frozen at a particular point in time. *Ibid.*; see *ibid.* (definition of "stay" cross-references definition of "injunction"). The term "stay," then, "is a subset of the broader term 'enjoin,'" *Teshome-Gebreegziabher*, 528 F.3d at 333, and "the plain meaning of enjoin includes the grant of a stay," *Weng* v. *United States Att'y Gen.*, 287 F.3d 1335, 1338 (11th Cir. 2002) (citing cases).

Accordingly, statutes and courts often speak of entering an "injunction" to "stay" judicial proceedings. For example, in the Anti-Injunction Act, Congress provided that "[a] court of the United States may not grant an injunction to stay proceedings in a State court." 28 U.S.C. 2283; see *Roudebush* v. *Hartke*, 405 U.S. 15, 20-21 (1972). Similarly, in the Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341 *et seq.*, Congress used "injunction" interchangeably with "stay" to describe judicial orders barring enforcement of administrative orders pending judicial review in the court of appeals. Thus, Congress provided that the filing of a petition for review "does not of itself stay or suspend the operation of the order of the agency," but that a court may issue an "interlocutory injunction" "restraining or suspending" the "enforcement, operation, or execution" of the order pending a final decision on the petition for review. 28 U.S.C. 2349(b).[3] Congress's use of the term "injunction" in the Hobbs Act to describe a judicial order barring enforcement or execution of an agency order pending judicial review is especially instructive, because Congress expressly provided that judicial review under the INA would be pursuant to the Hobbs Act. See 8 U.S.C. 1252(a)(1).

This Court too has long recognized that an injunction may operate to stay a matter. See, *e.g.*, *Hill* v. *McDonough*, 547 U.S. 573, 578-580 (2006) (habeas petitioner sought injunction to stay his execution); *McMillen* v. *Anderson*, 95 U.S. 37, 42 (1877) ("[Petitioner] can, if he is wrongfully taxed, stay the proceeding for its collection by process of injunction."). The courts of appeals likewise have acknowledged that a stay is a type of injunction. See, *e.g.*, *Kijowska* v. *Haines*, 463 F.3d 583, 589 (7th Cir. 2006) (stay "is a form of injunction"); *Nivens* v. *Gilchrist*, 319 F.3d 151, 153 (4th Cir. 2003) (denial of "injunction" to "stay [a] trial"); *Jove Eng'g, Inc.* v. *IRS*, 92 F.3d 1539, 1546 (11th Cir. 1996) (automatic stay is "essentially a court-ordered injunction").

Petitioner implicitly recognizes that the broad term "enjoin" may include a "stay," because he argues that his stay motion should be evaluated using the four-factor standard traditionally used for assessing the appropriateness of a *preliminary injunction*. That standard was widely used prior to Section 1252(f)(2)'s enactment to adjudicate requests by aliens seeking to avoid removal, see, *e.g.*, *Ignacio* v. *INS*, 955 F.2d 295, 299 & n.5 (5th Cir. 1992); see also Pet. Br. 4-5, and it is still used by courts that refuse to apply Section 1252(f)(2) to such requests, see, *e.g.*, *Arevalo* v. *Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003). Use of that standard "signal[s] that [those courts] understand aliens facing agency-ordered removal are seeking injunctive relief when they ask for a stay." *Teshome-Gebreegziabher* v. *Mukasey*, 545 F.3d 285, 287 (4th Cir. 2008) (Shedd, J., concurring in denial of reh'g en banc).

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[3] Section 2349(b) also provides for a "temporary stay or suspension" of an administrative order for up to 60 days pending a hearing on an application for the "interlocutory injunction."

3. Even if one were to distinguish between injunctions and stays, the relief petitioner seeks is better termed an injunction, rather than a stay. In its most customary usage, a stay is a tool by which a court freezes its own proceedings or suspends the operation of its own decisions or those of an inferior court pending further review. See *Black's* 1413 (defining "stay" as an "act of arresting a judicial proceeding by the order of a court" or "a suspension of the case or some designated proceedings within it").

As petitioner observes (Br. 21-23), stays sometimes may be distinguished from injunctions on the basis that a stay typically deprives a judicial order of the force of law pending further proceedings, while an injunction typically requires a person or entity to act or refrain from acting. That distinction does not help petitioner, because he is not asking the court of appeals to suspend its own proceedings or the effect of a lower court decision as part of a "single unified process" in the Article III courts; petitioner is seeking "not a mandate from court to court but from court to an administrative agency." *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940). Petitioner is asking the court to prohibit an Executive Department from taking an action that would be entirely lawful in the absence of any involvement by a court. Because petitioner seeks a remedy (a court order) that forbids a party to a judicial proceeding (the Executive Branch), from taking an action it is fully authorized to take, the most natural label for that remedy is an injunction. See *Teshome-Gebreegziabher*, 545 F.3d at 287 (Shedd, J., concurring in denial of reh'g en banc).

Petitioner's own characterization of his motion as requesting a "stay" is not dispositive. Section 1252(f)(2) speaks in terms of the relief afforded by a court, not the relief sought by the alien. See 8 U.S.C. 1252(f)(2) ("no court shall enjoin the removal"); see also *Dorelien* v. *United States Att'y Gen.*, 317 F.3d 1314, 1319 (11th Cir. 2003) (Hull, J., concurring in denial of reh'g en banc) ("[T]he focus in § 1252(f)(2) is on the nature of the relief a *court* is granting, irrespective of the nomenclature used."). An alien facing removal who requests a "stay" should not be treated differently from one who seeks an "injunction"; "both [are] seeking the identical relief—stopping the Government from removing them." *Teshome-Gebreegziabher*, 545 F.3d at 287 (Shedd, J., concurring in denial of reh'g en banc).

In any event, it is notable that petitioner himself has characterized the relief he seeks as an injunction. In his habeas corpus petition in the district court, see p. 8, *supra*, he specifically requested that the court enter "a [p]reliminary [i]njunction against the United States and all of its officers" prohibiting his removal. Habeas Pet. 18. Petitioner's current stay motion likewise is a request for injunctive relief.

4. To be sure, the term "enjoin" or "injunction" does not necessarily include a "stay" in every context. But in the context of judicial review of a final order of removal, a request like petitioner's is best understood as a request to "enjoin" his removal. That is because Congress authorized immediate execution of the removal order once agency proceedings are complete and carefully circumscribed the judicial review available after that point.

When an alien is charged with being removable from the United States, an IJ has the initial task of determining whether the alien is in fact removable. 8 U.S.C. 1229a(a); 8 C.F.R. 1003.12, 1240.1(a)(1)(i). If, after considering any applications for relief, the IJ enters an order of removal, that order becomes final when the alien's appeal to the Board is unsuccessful or the alien declines to appeal to the Board. See 8 U.S.C. 1101(47)(B); 8 C.F.R. 1241.1, 1241.31. Once an order of removal has become final, it may be executed at any time. See 8 U.S.C. 1252(b)(8)(C); 8 C.F.R. 1241.33. Removal orders "are self-executing orders, not dependent upon judicial enforcement." *Stone* v. *INS*, 514 U.S. 386, 398 (1995).

An alien may seek review of a final order of removal by filing a petition for review in the appropriate court of appeals. 8 U.S.C. 1252(a)(1). However, because the alien's claim has already been considered, and rejected, by two different agency adjudicators, Congress limited that review in numerous respects, and some claims are not reviewable at all. 8 U.S.C. 1252(a)(2).

Those unique features of immigration proceedings make clear that an alien who seeks to avoid removal while his petition for review is pending is seeking an injunction. At that point, administrative proceedings are complete and the order of removal is final. See

8 U.S.C. 1252(a)(1) and (d). The status quo is that the alien is removable and will be removed. See 8 C.F.R. 1241.33. An alien who asks a court of appeals to enter an order permitting him to remain in the United States is not seeking to stay the court of appeals' proceedings or any administrative proceedings; he is seeking to upset the status quo and tie the hands of the Executive Branch.

The fact that the alien in that circumstance is seeking an injunction is made clear when one considers the other forms of relief available to the alien. He has essentially three options to remain in the United States pending judicial review: he may seek a discretionary administrative stay from DHS, 8 C.F.R. 241.6(a), 1241.6(a); file a motion to reopen or reconsider and seek a stay from the IJ or the Board, 8 C.F.R. 241.6(b), 1241.6(b);[4] or ask the court of appeals to prevent his removal. The first option could be termed a "stay," because DHS is deciding whether to stay its *own* hand. The second option likewise could be termed a "stay," because the agency that entered the removal order is delaying the effectiveness of its *own* order. The third option, unlike the first two, requires the court not to halt its own proceedings, but to prevent a party to judicial proceedings not to take an action, and it is therefore more properly termed an injunction. See 28 U.S.C. 2349(b).

5. Petitioner cites (Br. 23-25, 28-32) uses of the terms "stay" and "enjoin" in various other contexts to suggest that the term "enjoin" cannot encompass a "stay." Those references are largely beside the point,

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[4] The filing of a motion to reopen or a motion for reconsideration does not automatically stay execution of the decision; a separate stay motion generally is required. See 8 C.F.R. 1003.23(b)(1)(v) and (4)(i).

because they ignore the specific context of the INA. Interpreting the term "enjoin" in Section 1252(f)(2) to include a stay request would not create confusion because of the specific ways in which Congress used the terms "stay" and "enjoin" in the INA.

In the INA, Congress used the word "stay" in two senses—to refer to the act of remaining in a given location,[5] and to refer to a stay of removal.[6] Recognizing that a stay in the latter context is a form of injunction in Section 1252(f)(2) does not create confusion about the term's use in the former context. Nor does it result in the term "enjoin" being incorrectly applied to an action by DHS or the Board to stay its own hand. That is because when Congress meant the word "stay" to refer to agency proceedings or orders, it explicitly said so. See 8 U.S.C. 1186a(d)(2)(C) ("[T]he Attorney General may stay such removal proceedings against an alien."), 1186b(d)(2)(C) (same).

At the same time, interpreting "enjoin" to include stays of removal does not create doubt about the other uses of "enjoin" in the INA. Those references, like the reference in Section 1252(f)(2), refer to actions that prevent a certain actor from engaging in a specified act.[7]

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[5] See 8 U.S.C. 1103(d)(2), 1182(a)(7)(B)(i)(I), (a)(9)(B)(ii) and (iv)(2), (*l*)(1) and (n)(2)(C)(v), 1184(a)(1), (c)(9)(A)(ii) and (11)(A)(ii), (k), (k)(3) and (n)(2)(B), 1202(c), (g) and (g)(1), 1225(a)(5), 1255a(a)(2)(B), 1351; 8 U.S.C. 1187(c)(8)(C)(ii)(I) and (i)(3) (Supp. I 2007).

[6] See 8 U.S.C. 1160(d), 1229a(b)(5)(C) and (c)(7)(C)(iv), 1229c(f), 1231(a)(1)(B)(ii) and (c)(2), 1252(b)(3)(B), 1255a(e).

[7] See 8 U.S.C. 1188(g)(2) (Secretary of Labor may "seek[] appropriate injunctive relief" against employers who violate regulations regarding temporary immigrant workers), 1227(a)(2)(E)(ii) (authorizing removal of "[a]ny alien who at any time after admission is enjoined under a protection order"), 1252(e)(1) ("no court may * * * enter declar-

Petitioner's references (Br. 23-25, 30-32) to other contexts provide no basis for limiting the term "enjoin" under the INA. For example, application of Section 1252(f)(2) to motions to prevent an alien's removal while a petition for review is pending does not create confusion about the applicability of Federal Rule of Civil Procedure 65 or Federal Rules of Appellate Procedure 8 and 18 to stay motions (see Pet. Br. 23-24), because only the latter apply in the courts of appeals, where petitions for review are adjudicated. Petitioner's citation (Br. 24-25) to *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271 (1988), likewise does not support his position. In holding that "orders granting or denying stays of 'legal' proceedings" are not automatically appealable as injunctions under 28 U.S.C. 1292(a)(1), this Court used the term "stay" in a particular sense, as referring to a court's decision to hold its own proceedings in abeyance. 485 U.S. at 273, 287-288. And it noted that it *would* treat as appealable under Section 1292(a)(1) "orders that have the practical effect of granting or denying injunctions." *Id.* at 287-288. That is precisely the case here: although petitioner termed his motion one for a "stay," he is seeking to "enjoin" DHS from taking any action to remove him, and Section 1252(f)(2) therefore applies.

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atory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with" the provision addressing inspection of aliens who arrive in the United States), 1252(f)(1) ("no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of" the immigration laws), 1324a(f) (providing "[c]riminal penalties and injunctions for pattern or practice violations" committed by employers of aliens not authorized for employment).

B. The Statutory Structure Confirms That Section 1252(f)(2) Governs Motions To Prevent Removal Pending Judicial Review

In addition to reviewing the text of the provision at issue, this Court determines the "plainness or ambiguity of statutory language" by looking to "the specific context in which that language is used" and "the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). Reading Section 1252(f)(2) in the context of Congress's comprehensive scheme for judicial review of final removal orders reinforces the conclusion that it applies to requests for stays of removal.

1. The statutory language at issue appears in Section 1252, the provision of the INA that provides a complete set of procedures and standards for judicial review. Section 1252 confers jurisdiction on the courts of appeals to review final orders of removal, 8 U.S.C. 1252(a), and requires that all challenges to removal orders be brought in a petition for review, 8 U.S.C. 1252(a)(5), (b)(9) and (g). It also places a number of limitations on the types of claims that are reviewable, the scope of review, and the remedies that are available. For example, Section 1252 precludes review of certain denials of discretionary relief and orders of removal entered against criminal aliens, 8 U.S.C. 1252(a)(2), and provides deferential standards of review for reviewing the agency's factual findings and discretionary decisions, 8 U.S.C. 1252(b)(4). It also addresses various procedural aspects of judicial review, requiring exhaustion of administrative remedies, 8 U.S.C. 1252(d)(1), and providing strict filing deadlines for briefs, 8 U.S.C. 1252(b)(3)(C).

Two portions of Section 1252 are relevant to evaluating stays of removal. First, Section 1252(b)(3)(B) states that, as a procedural matter, "[s]ervice of the petition [for review] on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." Cf. 28 U.S.C. 2349(b) (first sentence). That provision makes clear that the mere filing of a petition for review does not preclude DHS from removing the alien from the United States. But it does not provide a standard for courts to use in determining whether a stay of removal is warranted.

Second, Section 1252(f) provides substantive standards for when aliens may obtain certain types of relief. Section 1252(f)(1) provides that "no court (other than the Supreme Court) shall have jurisdiction or authority" to "enjoin or restrain" operation of the immigration laws, "other than with respect to the application of [the immigration laws] to an individual alien." As this Court has explained Section 1252(f)(1) is addressed to attempts to enjoin operation of the immigration laws on a class-wide basis. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-482 (1999) (*AAADC*). Section 1252(f)(1) applies "[r]egardless of the nature of the action or claim or the identities of the party or parties bringing the action." 8 U.S.C. 1252(f)(1).

Section 1252(f)(2) is written in comparably sweeping terms and rounds out the restrictions on injunctive relief. Section 1252(f)(2) applies to requests for injunctive relief made by individual aliens, the situation expressly excluded from the reach of Section 1252(f)(1). See 8 U.S.C. 1252(f)(2) ("no court shall enjoin the removal of any alien"). And Section 1252(f)(2) concerns the enjoining of a particular act—DHS's "removal of any alien" from the United States. *Ibid.*

Read against the backdrop of Section 1252(b)(3)(B) and Section 1252(f)(1), it is clear that Section 1252(f)(2) encompasses a stay request made by an individual alien. Because Section 1252(b)(3)(B) does not provide a standard for evaluating stays of removal, it is natural to look to another part of Section 1252 for such a standard. See *Teshome-Gebreegziabher*, 545 F.3d at 288 (Shedd, J., concurring in denial of reh'g en banc) (concluding that the INA "offers only one standard [for adjudicating a request for stay of removal]—that found in § 1252(f)(2)"). Section 1252(f)(2) applies to stays of removal, because the term "enjoin" includes a court order preventing a party from taking a specific action ("the removal of an alien"). See pp. 13-14, *supra*. And Congress's use of the comprehensive term "enjoin," rather than the narrower term "stay," is consistent with its intention to broadly preclude the courts from taking actions to impede the execution of the immigration laws in Section 1252(f)(1) and (2).

The application of Section 1252(f)(2) to stays of removal is reinforced by Section 1252(g), which provides that, "[e]xcept as provided in [Section 1252] and notwithstanding any other provision of law (statutory or nonstatutory), * * * no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to * * * execute removal orders against any alien under this chapter." Section 1252(g) was intended, *inter alia*, to ensure that all potential actions with respect to stays of execution of removal orders will be in the courts of appeals as part of the proceedings on petition for review as specified in Section 1252, *AAADC*, 525 U.S. at

485, and where subsection (g) applies, it incorporates the rest of Section 1252, including subsection (f), *id.* at 487.

2. If Section 1252(f)(2) does not apply to an alien's request to stay his removal pending judicial review, "it is unclear when * * * [that provision] would ever apply." *Teshome-Gebreegziabher*, 528 F.3d at 334. That is because the *only* way to obtain "[j]udicial review of * * * questions of law and fact * * * arising from any action taken or proceeding brought to remove an alien from the United States" is by way of a petition for judicial review of a final order of removal. 8 U.S.C. 1252(b)(9); accord 8 U.S.C. 1252(a)(5) and (g). Contrary to petitioner's suggestion (Br. 28), a court that concludes that an alien is entitled to relief in connection with a petition for review does "not 'enjoin' the removal of [that] alien"; "instead, [it] vacate[s] the agency's final order of removal." *Teshome-Gebreegziabher*, 528 F.3d at 334. Section 1252(f)(2) therefore cannot apply in that instance. Accordingly, if Section 1252(f)(2) does not apply to the interlocutory injunctive relief of a stay of removal pending adjudication of a petition for review, it likely has no application at all.

Petitioner suggests (Br. 37-38) that Section 1252(f)(2) serves the "independent purpose" of "preserv[ing] the ability of courts to grant injunctive relief" in cases "where neither § 1252(b)(9) nor § 1252(g) would apply to preclude judicial review outside the context of the underlying removal order itself." As petitioner himself notes (Br. 37), however, a final order of removal may be challenged only through a petition for review under Section 1252. See 8 U.S.C. 1252(a)(5), (b)(9) and (g). It is therefore difficult to imagine a situation in which an alien could seek an injunction to prevent removal that would not arise in the context of a petition for review.

Tellingly, petitioner does not provide any specific example of a claim that, in his view, would be evaluated using the standard contained in Section 1252(f)(2). Moreover, there are no published decisions in the courts of appeals that have applied the Section 1252(f)(2) standard outside the context of an alien's request for a stay of removal.

In any event, even if there might be some situation in which subsection (f)(2) of Section 1252 would apply other than a request for an injunction barring removal pending a petition for review under Section 1252, that would not detract from the conclusion that Section 1252(f)(2)'s principal application is in that context. Section 1252(f)(2) provides that "no court shall enjoin the removal of any alien pursuant to a final order *under this section*." 8 U.S.C. 1252(f)(2) (emphasis added). The phrase "under this section" makes clear that Section 1252(f)(2) applies *at least* to injunctions entered in conjunction with petitions for review filed under "this section"—*i.e.*, Section 1252.

3. Petitioner suggests (Br. 33-34) that Section 1252(b)(3)(B) provides a standard for courts to use in evaluating stay requests, because by "establish[ing] that stays of removal would be discretionary rather than automatic," Congress indicated that the courts should evaluate stay requests using the four-part standard for preliminary injunctive relief. Petitioner is mistaken. Section 1252(b)(3)(B) gives courts the authority to enter an order staying removal ("unless the court orders otherwise"), but it does not specify that a stay may be granted "in the court's discretion" or provide any other standard for evaluating stay requests.

Petitioner also contends (Br. 33-34) that because the language used in Section 1252(b)(3)(B) is similar to the language used in 8 U.S.C. 1105a(a)(3) (1994), the same substantive standard must be used for both. That is incorrect. Neither the pre-IIRIRA phrase "unless the court otherwise directs" nor the post-IIRIRA phrase "unless the court orders otherwise" states a standard. Pre-IIRIRA, therefore, courts could choose the usual four-part standard for preliminary injunctive relief. Congress's addition of a statutory standard in Section 1252(f)(2) foreclosed that option post-IIRIRA.

Petitioner errs in suggesting (Br. 33) that if Congress intended Section 1252(f)(2) to apply to stays of removal, it would have said so in Section 1252(b)(3)(B). Because Section 1252(b) relates primarily to the procedural aspects of petitions for review, it is unsurprising that Congress chose to put the substantive standard for injunctive relief in a separate subsection. In any event, no cross-reference is required to displace whatever standard might have been applied in the absence of Section 1252(f)(2), because Section 1252(f)(2) applies "[n]otwithstanding any other provision of law." 8 U.S.C. 1252(f)(2).

Petitioner asserts (Br. 35-36) that, if Section 1252(f)(2) sets forth the standard for evaluating aliens' stay requests, then Section 1252(b)(3)(B) becomes surplusage. That argument ignores the historical context in which Section 1252(b)(3)(B) was enacted. Because the INA had previously provided for an automatic stay of deportation upon the filing of a petition for review unless the court of appeals otherwise directed, 8 U.S.C. 1105a(a)(3) (1994), Congress decided to make explicit that it was eliminating that rule, 8 U.S.C. 1252(b)(3)(B). See pp. 29-31, *infra*. That also explains why Section 1252(b)(3)(B) uses the term "stay," rather than Section 1252(f)(2)'s comprehensive term "enjoin."

In petitioner's view (Br. 35), Section 1252(b)(3)(B) and Section 1252(f)(2) cannot both apply to stays of removal because Congress did not include Section 1252(f)(2) in its special transitional rules. But all that shows is that Congress decided not to apply the heightened standard in Section 1252(f)(2) to cases that were pending at the time of IIRIRA's enactment in order not to upset automatic stays (or orders abrogating such stays) that were already in effect, and to ensure that aliens had sufficient notice that it would be difficult to obtain a stay pending judicial review.

Finally, petitioner contends (Br. 36-37) that Section 1252(f)(2) does not apply to stays because in Section 1252(f)(1), the term "enjoin" refers to permanent injunctions, and the term "restrain" refers to preliminary injunctions. That is incorrect. "Nothing in the text of § 1252(f)(1) indicates that 'restrain' applies only to temporary relief while 'enjoin' applies to permanent relief." *Teshome-Gebreegziabher*, 528 F.3d at 333. The plain meaning of "enjoin" encompasses both temporary and permanent relief. See pp. 13-16, *supra*; see also, *e.g.*, *Winter* v. *NRDC*, 129 S. Ct. 365, 373-374 (2008) (plaintiffs sought a preliminary "injunction"). The term "restrain," in particular, is often used synonymously with "enjoin." *Black's* 1314 ("restrain" is "[t]o enjoin"); see also, *e.g.*, 29 U.S.C. 217 (authorizing "[i]njunction proceedings" to "restrain" violations of the Fair Labor Standards Act); *Arevalo*, 344 F.3d at 7 ("[C]ourts frequently use the terms 'enjoin' and 'restrain' interchangeably.").

Petitioner is also mistaken in suggesting (Br. 36-37) that "enjoin" must refer to permanent injunctive relief because the term is used in that sense in the Hobbs Act, upon which Section 1252 was modeled. The Hobbs Act does not use the term "enjoin" to refer only to permanent relief. See 28 U.S.C. 2349(b) (authorizing an "interlocutory injunction"). Moreover, unlike orders of other agencies reviewable under the Hobbs Act, courts do not enter permanent injunctions against the Board or DHS in connection with individual petitions for review of final removal orders. See p. 25, *infra.* In any event, the meaning of "enjoin" is not limited based on its usage in the Hobbs Act, because Section 1252(f)(2) applies "[n]otwithstanding any other provision of law." 8 U.S.C. 1252(f)(2); see *Weng*, 287 F.3d at 1340 n.9; see also *Stone*, 514 U.S. at 397-398 (Hobbs Act tolling rule does not apply to motions to reopen under the INA). Section 1252(f)(2)'s context therefore demonstrates that it applies to an alien's efforts to prevent his removal from the United States pending consideration of his petition for review.

C. The Drafting History Confirms That Section 1252(f)(2) Applies To Stays Of Removal

In 1996, Congress enacted a sea change in immigration law when it enacted IIRIRA. IIRIRA was designed to streamline judicial review of final orders of removal and ensure the prompt removal of illegal aliens from the United States. A comparison of the pre- and post-IIRIRA regimes makes plain Congress's intent to apply Section 1252(f)(2) to motions for stays of removal pending judicial review.

1. Prior to IIRIRA, most aliens who were ordered removed from the United States were afforded an automatic stay of removal once they sought judicial review, unless the court "otherwise direct[ed]" or the alien had been "convicted of an aggravated felony." 8 U.S.C. 1105a(a)(3) (1994). The INA provided no standard for

courts to use in resolving stay issues. Consequently, the courts decided to treat an "application for a discretionary stay as a request for injunctive relief" and used the four-part standard for preliminary injunctive relief. See Pet. Br. 4-5.

At that time, the INA also provided that the courts of appeals lost jurisdiction over an alien's petition for review if the alien left the United States. See 8 U.S.C. 1105a(c) (1994). Because aliens could not obtain judicial review of their orders of removal from abroad, Congress presumptively permitted them to remain in the United States in order to do so.

2. IIRIRA fundamentally altered that scheme. See *AAADC*, 525 U.S. at 475 ("IIRIRA * * * repealed the old judicial-review scheme set forth in § 1105a and instituted a new (and significantly more restrictive) one in 8 U.S.C. § 1252."). As relevant here, IIRIRA eliminated the provision of the INA providing that the filing of a petition for review stays the alien's removal. § 306(b), 110 Stat. 3009-612. Moreover, Congress expressly stated that an alien's right to judicial review "does not require the Attorney General to defer removal of the alien." 8 U.S.C. 1252(b)(8)(C). As a result of those changes, removal at the conclusion of agency proceedings came to be the norm, rather than the exception.

In order to ensure that aliens could still obtain judicial review, Congress repealed the INA provision that prohibited courts from considering a petition for review if the alien departed or was removed from the United States. See IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)). As a result, the courts of appeals now retain jurisdiction over a petition for review after an alien leaves the United States. See, *e.g.*, *Dada*, 128 S. Ct. at 2320.

In addition to eliminating automatic stays and authorizing aliens to pursue petitions for review from abroad, Congress enacted Section 1252(f)(2). Section 1252(f)(2) heightened the standard for aliens who wish to remain in the United States pending judicial review. That provision, in conjunction with the other amendments, furthers Congress's goal of expediting removal of illegal aliens from the United States while ensuring the availability of judicial review.

IIRIRA thus altered the balance between courts and the Executive Branch when it comes to final orders of removal by fundamentally changing the nature of review once agency proceedings are complete. IIRIRA shifted the focus from court review to agency review, providing that an order of removal was immediately executable when agency proceedings are complete, even when a petition for review is filed. Rather than granting courts broad discretion to issue stays of removal, Congress limited the circumstances under which the courts could prevent removal, see 8 U.S.C. 1252(f)(2), so that the agency could exercise that discretionary authority, see 8 C.F.R. 241.6, 1241.6(a), 1241.33(a). As this Court has recognized, "protecting the Executive's discretion from the courts * * * can fairly be said to be the theme of the legislation." *AAADC*, 525 U.S. at 486.

3. Petitioner essentially ignores the profound effect of IIRIRA on the removal process. In his view (Pet. Br. 33-34), Congress intended stays of removal after IIRIRA to be evaluated using the same standard applied prior to IIRIRA. But IIRIRA's elimination of automatic stays and its addition of a statutory standard for injunctive relief make plain Congress's intention to render it more difficult for aliens to remain in the United States after the agency has rejected their claims. Because peti-

tioner's interpretation of the statute "runs afoul of the express policy and statutory structure Congress set out in IIRIRA, which vested much discretion in the Executive," it should be rejected. *Teshome-Gebreegziabher*, 528 F.3d at 334.

Petitioner's view also fails to give any operative effect to Section 1252(f)(2), see pp. 25-26, *supra*, and it is contrary to the well-settled principle that when Congress makes a change in the statutory text, that change should be given effect, see, *e.g.*, *Stone*, 514 U.S. at 397. Petitioner faults Congress for failing to explain in the legislative history that it intended Section 1252(f)(2) to apply to stays. Pet. Br. 39.[8] But this Court has long held that "legislative history need not confirm the details of changes in the law effected by statutory language before [it] will interpret the language according to its natural meaning." *Morales* v. *TWA*, 504 U.S. 374, 385 n.2 (1992). Here, the language of Section 1252(f)(2), read in light of IIRIRA's other measures to streamline removal of aliens from the United States, makes clear that it applies to stays of removal.

4. Petitioner points (Br. 39-40) to two rejected proposals as evidence that Congress did not intend Section 1252(f)(2) to apply to stays of removal. Failed legislative proposals are "a particularly dangerous ground on which to rest an interpretation of a prior statute," *PBGC* v. *LTV Corp.*, 496 U.S. 633, 650 (1990), because "several equally tenable inferences may be drawn from such inac-

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[8] It appears that the only discussion of Section 1252(f)(2) in the legislative history is the statement that "courts may issue injunctive relief pertaining to the case of an individual alien, and thus protect against any immediate violation of rights." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 161 (1996) (*House Report*). That statement sheds little if any light on the question presented here.

tion, including the inference that the existing legislation already incorporated the offered change," *United States* v. *Craft*, 535 U.S. 274, 287 (2002) (internal quotation marks omitted). That is particularly true with respect to the proposals petitioner cites.

The first was a proposal considered in connection with the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, which would have amended Section 1252(b)(3)(B) to read: "Service of the petition * * * does not stay the removal of an alien pending the court's decision on the petition, unless *pursuant to subsection (f)* the court orders otherwise." H.R. 418, 109th Cong., 1st Sess. § 105(a)(2)(A) (2005) (emphasis added); see 151 Cong. Rec. H536, H538, H566 (daily ed. Feb. 10, 2005). That provision apparently was deleted from the bill by the Conference Committee, and the legislative record includes no explanation for the deletion or the inclusion of the language in the first place. Without more, there is no basis to make any assumptions about Congress's understanding in 2005, much less when it enacted Section 1252(f)(2) nine years earlier.

The second proposal is similarly unhelpful. It arose in the context of the proposed Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., 2d Sess. (Apr. 7, 2006), which never became law. It proposed to amend Section 1252(f)(2) to read: "[N]o court shall enjoin, *or stay, whether temporarily or otherwise*, the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." *Id.* § 227(c) (emphasis added). That provision was deleted during the floor debate in the Senate, see 152 Cong. Rec. S5146-S5153, S5188 (daily ed. May. 25, 2006), and was never considered by the House. That action sheds no light on Congress's intent in enacting Section 1252(f)(2) either, especially when compared to the "broad statutory language that Congress did enact." *Craft*, 535 U.S. at 288.

D. Applying Section 1252(f)(2) To Stay Requests Furthers Congress's Purposes In Enacting IIRIRA

This Court has explained that "the purposes underlying the [statute in issue] are most properly fulfilled by giving effect to the plain meaning of the language as Congress enacted it." *Dunn* v. *CFTC*, 519 U.S. 465, 474 (1997). That is particularly true here, because interpreting the broad term "enjoin" in Section 1252(f)(2) to encompass stays of removal furthers Congress's manifest purpose of expediting the removal of illegal aliens from the United States.

1. The legislative record demonstrates that Congress enacted IIRIRA to "expedit[e] the removal of excludable and deportable aliens, especially criminal aliens," from the United States. S. Rep. No. 249, 104th Cong., 2d Sess. 2 (1996) (*Senate Report*); see, *e.g.*, *House Report* 107-108 (purpose of IIRIRA was to "streamline[] [the] appeal and removal process"); *id.* at 157 (IIRIRA made it "easier to remove deportable aliens from the United States"); *Senate Report* 3 (key purpose of IIRIRA was to "expedite exclusion and deportation"). That paramount goal has been often acknowledged by the courts of appeals. See, *e.g.*, *Martinez* v. *Mukasey*, 519 F.3d 532, 544 (5th Cir. 2008); *Morales-Izquierdo* v. *Gonzales*, 486 F.3d 484, 494 (9th Cir. 2007) (en banc); *Appiah* v. *United States INS*, 202 F.3d 704, 707 (4th Cir. 2000).

Congress enacted IIRIRA on the understanding that "[t]he opportunity that U.S. immigration law extends to aliens to enter and remain in this county is a privilege, not an entitlement." *Senate Report* 7. It noted that "[a]liens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others." *Ibid.*

Congress chose to take decisive action to deal with aliens who entered or remained in the United States illegally and then manipulated the system of judicial review to delay their removal. See *House Report* 122 (noting that illegal aliens often "frustrate removal through taking advantage of certain procedural loopholes in the current removal process"). Because "[e]xisting procedures to deny entry to and remove illegal aliens from the United States [were] cumbersome and duplicative," *id.* at 107, Congress acted to make removal easier.

Congress made clear its view that aliens "who violate U.S. immigration law should be removed from this country as soon as possible." *Senate Report* 7. "Exceptions" to that general rule were to be "provided only in extraordinary cases specified in the statute and approved by the Attorney General." *Ibid.* That scheme reflects Congress's policy judgment that the best way to permit judicial review while ensuring that aliens do not overstay their welcome is to enact a regime under which an alien who has "exhaust[ed] multiple levels of administrative review" should "be removed while his petition [for review] is pending, unless he satisfied the demanding standard of § 1252(f)(2)." *Teshome-Gebreegziabher*, 528 F.3d at 335.

2. Petitioner's contrary reading of the statute thwarts Congress's purposes. The standard petitioner advocates for assessing stays is significantly less de-

manding than the standard contained in Section 1252(f)(2). Choosing petitioner's standard would permit greater numbers of aliens whose claims have been denied by the agency to remain in the United States, which would directly "undercut Congress'[s] decision to expedite removals." *Teshome-Gebreegziabher*, 528 F.3d at 335.

Petitioner's standard for assessing stays of removal would encourage illegal aliens to file non-meritorious petitions for review in the courts of appeals simply for purposes of delay. That conclusion has been borne out by experience. In the Ninth Circuit—which enters a temporary automatic stay when a stay motion is filed, 9th Cir. Gen. Order 6.4(c)(1), and then uses the preliminary injunction standard for deciding that motion, *e.g.*, *Andreiu* v. *Ashcroft*, 253 F.3d 477, 480-482 (9th Cir. 2001) (en banc)—there was a 42 percent rate of filing a petition for review of Board decisions in 2007. Administrative Office of the U.S. Courts, *U.S. Courts of Appeals—Rate of Appeal for BIA Decisions—FY 2001-2007* (Dec. 3, 2007) (*Admin. Office Report*) (on file with the Administrative Office of the United States Courts). In contrast, in the Eleventh Circuit, which does not grant an automatic stay and which applies the more rigorous Section 1252(f)(2) standard, *e.g.*, *Weng*, 287 F.3d at 1336-1340, there was a 9 percent rate of filing a petition for review in 2007. *Admin. Office Report*.

Petitioner's case vividly illustrates the ways in which some aliens manipulate the system of judicial review to avoid removal. Petitioner entered the United States on a transit visa in 2001 and has remained here illegally for almost *eight years*. J.A. 8-9. Although an immigration judge determined that petitioner was not credible, J.A. 8-23, 32-37, and both the Board, J.A. 44-49, and the court of appeals, J.A. 51-54, rejected his claims, petitioner has filed *three* motions to reopen his case, J.A. 58-68; A.R. 155-160, 283-289. Petitioner also filed a separate habeas corpus action as an end-run around the Board and the court of appeals. As a result of all of those efforts, petitioner has made five different submissions to the Board and presented claims to two different federal courts, one of which has already rejected his claims on two different occasions. Petitioner is now before this Court seeking a stay so that he can attempt to revive a claim that lacks merit, see pp. 48-52, *infra*, in order to continue delaying his removal from the United States. Application of Section 1252(f)(2) is necessary to return to the system Congress intended, under which it is only in "exceptional" cases that an alien is permitted to remain in the United States after the Board has rejected his claims.

3. Petitioner suggests a number of reasons why Congress might not have wanted to apply the Section 1252(f)(2) standard to stays of removal. Many of those arguments apply to *any* stay standard, and none of them provides a basis for disregarding Congress's policy judgment.

a. First, petitioner (Br. 41-42) and his amici (AILA Br. 21-29) suggest a number of potential practical problems with application of the Section 1252(f)(2) standard to stays of removal. Petitioner objects (Br. 41) that courts would be required to apply a more stringent standard for a stay pending removal than for relief on the merits. Section 1252(f)(2) directs courts not to enjoin an alien's removal unless the alien "shows by clear and convincing evidence that" removal "is prohibited as a matter of law." 8 U.S.C. 1252(f)(2). Most naturally read, that requires aliens to establish fact-based claims by clear and convincing evidence and demonstrate on legal claims that they are entitled to judgment as a matter of law. See, *e.g.*, *Teshome-Gebreegziabher*, 528 F.3d at 335; *Weng*, 287 F.3d at 1340 & n.11. For fact-based claims, the standard would appear to be slightly less demanding than the highly deferential substantial evidence standard. See *Teshome-Gebreegziabher*, 528 F.3d at 335; see also *INS* v. *Elias-Zacarias*, 502 U.S. 471, 481 n.1, 483-484 (1992) (court may only reverse under substantial evidence review if "the evidence [the alien] presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution"); 8 U.S.C. 1252(b)(4)(B); see generally *Dickinson* v. *Zurko*, 527 U.S. 150 (1999). For purely legal claims, review is essentially de novo, similar to that on merits review, but with due regard to the need to grant relief with confidence in the limited time available to rule on the stay motion.

Even if the Section 1252(f)(2) standard required a more demanding showing for a stay than for success on the merits, that is a choice Congress is entitled to make. Congress has plenary authority over immigration policy. See, *e.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587 & n.11 (1952). Rather than grant courts broad discretion to grant stays, Congress instead decided to vest that discretion with DHS. See 8 C.F.R. 241.6; see p. 31, *supra*.

Petitioner's amici erroneously suggest (AILA Br. 26-28) that the Section 1252(f)(2) standard is unfair because aliens seeking a stay do not have a full copy of the administrative record. An alien who appeals to the Board is provided a copy of the IJ decisions and transcript of his hearing, see 8 C.F.R. 1003.3(c)(1); *Board of Immigration Appeals Practice Manual* § 4.2(d), at 50

(July 30, 2004) <http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm> (*Board Practice Manual*), and he is served with copies of briefs and other documents filed by DHS, *Immigration Court Practice Manual* § 3.2, at 39-40 (Apr. 1, 2008) <http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.htm>; *Board Practice Manual* § 3.2, at 36-37. In addition, the alien would have copies of the documents he has filed. An alien therefore cannot credibly claim that he lacks the materials required to prepare a stay request.[9] In any event, this contention, like amici's other practical concerns (ALIA Br. 26-29), applies to a requirement to make *any* showing in order to obtain a stay.

b. Petitioner also contends (Br. 42-46) that the application of the Section 1252(f)(2) standard will lead to unjust results because some aliens with meritorious claims will be removed. Both the Section 1252(f)(2) standard and the preliminary injunction standard require petitioner to make a strong showing on the merits. Compare 8 U.S.C. 1252(f)(2) ("clear and convincing evidence" that removal is "prohibited as a matter of law"), with *Winter*, 129 S. Ct. at 374 (a "likel[ihood] [of] succe[ss] on the merits"). This argument, like many of petitioner's policy arguments, is "not really [an] argument[] against the § 1252(f)(2) standard," but is an "argument[]

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[9] Amici's concerns about aliens proceeding pro se (AILA Br. 23-24) likewise provide no basis to ignore Section 1252(f)(2). The Attorney General is required to "provide for lists (not updated less than quarterly) of persons who have indicated their availability to represent pro bono aliens" in removal proceedings and make that list generally available, 8 U.S.C. 1229(b)(2), and regulations require that aliens be provided with a list of free legal services located in the district where their removal hearing is held, 8 C.F.R. 1240.10(a)(1)-(3).

against *any* standard other than an automatic stay." *Teshome-Gebreegziabher*, 545 F.3d at 288 (Shedd, J., concurring in denial of reh'g en banc). A preliminary injunction is itself an "extraordinary and drastic remedy" that is not lightly granted. *Munaf* v. *Geren*, 128 S. Ct. 2207, 2218-2219 (2008). Section 1252(f)(2) sets forth a higher burden for an alien to meet, but that burden "is not insurmountable." *Teshome-Gebreegziabher*, 545 F.3d at 288-289 (Shedd, J., concurring in denial of reh'g en banc) (providing example of *Fernandez* v. *Keisler*, 502 F.3d 337 (4th Cir. 2007), cert. denied, 129 S. Ct. (2008), where the court granted a stay of removal "where it appeared that the [alien's] removal was prohibited by [circuit precedent]," but ultimately denied the petition for review because circuit precedent did not control the outcome of alien's case). A stay also would be appropriate, for example, where there is a clear administrative error or an erroneous interpretation of the statute and other requirements were satisfied.

Moreover, application of the Section 1252(f)(2) standard is unlikely to lead to the unjust results petitioner fears. By the time the alien presents his claim to the court of appeals, it will have been considered in multiple levels of agency review. See *Teshome-Gebreegziabher*, 545 F.3d at 289 (Shedd, J., concurring in denial of reh'g en banc). Many aliens seeking asylum succeed on their claims before the agency. See Executive Office for Immigration Review, *FY 2007 Statistical Yearbook*, A1 <http://www.usdoj.gov/eoir/statspub/fy07syb.pdf> (in fiscal year 2007, IJs granted 46% of asylum applications). Contrary to petitioner's suggestion (Br. 43-44), if the Board denies relief, the court of appeals is likely to affirm that decision: the Board has an affirmance rate of over 90% in the courts of appeals. See Executive

Office for Immigration Review, *BIA Restructuring and Streamlining Procedures* 2 (Mar. 9, 2006) <http://www.usdoj.gov/eoir/press/06/BIAStreamliningFactSheet030906.pdf>.

Even if the alien's stay request is denied by the court of appeals, he has other avenues for relief. If the alien previously had applied for asylum or withholding of removal and circumstances have changed since the application was denied, he may file a motion to reopen and seek a stay of removal with the Board. See 8 C.F.R. 1003.2, 1241.6(b). Even in the absence of changed circumstances, he may seek a stay of removal from DHS, which maintains full discretion to permit him to remain in the United States if he would face harm abroad. See 8 C.F.R. 241.6. Petitioner's assertion (Br. 42) that "there is no mechanism" to prevent unjust results, therefore, is wrong.

Petitioner, an alien, also suggests (Br. 44-46) that application of the Section 1252(f)(2) standard would lead to removal of United States citizens. Petitioner has not offered evidence to suggest that DHS is likely to remove United States citizens, in the Fourth and Eleventh Circuits or anywhere else. Nonetheless, the potential for removal of a citizen is an issue that DHS takes very seriously. If an alien claims to be a citizen, United States Immigration and Customs Enforcement reviews the alien's file and all relevant databases to locate information supporting the citizenship claim. If documentation is discovered that indicates the individual is a citizen, he is released immediately. If the individual is placed in removal proceedings, DHS will encourage him to concurrently pursue a citizenship claim with the immigration court and United States Citizenship and Immigration Services to obtain an adjudication of citizenship. If the individual is unable to establish citizenship through those avenues, he may seek a stay from the court of appeals as he pursues his petition for review. At that point, the INA provides that if "a genuine issue of material fact about the [individual's] nationality is presented," his claim will be transferred to a federal district court for a hearing. 8 U.S.C. 1252(b)(5). Under those circumstances, a stay would be granted, because removing the individual without such a hearing would be "prohibited as a matter of law." 8 U.S.C. 1252(f)(2). There is, therefore, no reason to refuse to apply the Section 1252(f)(2) standard because of fears about removal of United States citizens.

E. No Canon Of Construction Justifies Ignoring The Clear Import Of Section 1252(f)(2)

Petitioner and his amici invoke several canons of construction in order to avoid the application of Section 1252(f)(2) to motions for stays of removal. None provides a basis for doing so.

1. Petitioner suggests that his reading of the statute is supported by the proposition that Congress would not "deprive the Court of Appeals" of the power to "stay orders under review" "without clearly expressing such a purpose." Br. 19 (quoting *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 11 (1942)). That principle is inapplicable here for two reasons. First, Section 1252(f)(2) does not deprive the courts of appeals of the authority to enter stays; the INA authorizes them to enter stays, 8 U.S.C. 1252(b)(3)(B), but only if Section 1252(f)(2)'s standard is met. Second, in enacting IIRIRA, Congress clearly evidenced its intention to shift discretion from the courts to the Executive Branch. See *AAADC*, 525 U.S. at 486 ("*[M]any* provisions of IIRIRA are aimed at

protecting the Executive's discretion from the courts."); see also *Scripps-Howard*, 316 U.S. at 10 (courts' stay authority should not be interpreted "without regard to the division of function which the legislature has made between the administrative body and the court of review").

2. Nor is there any basis for choosing petitioner's reading of the statute in order to avoid the purported Suspension Clause concerns advanced by petitioner's amici. See Law Professors Br. 7-16. That argument was not presented to or passed on by the court of appeals, and petitioner has not raised it here. See, *e.g.*, *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992). In any event, it lacks merit, because Section 1252(f)(2) in no way precludes a court from entering a stay of removal in an appropriate case, and amici cite no authority suggesting that an alien's claim for relief must be adjudicated under a more lenient standard. Indeed, this Court held in *Munaf*, even in the absence of a provision like Section 1252(f)(2), that a preliminary injunction is an "extraordinary and drastic" remedy in habeas corpus and requires a showing of at least a likelihood of success on the merits. 128 S. Ct. at 2219 (internal quotation marks omitted).

Importantly, the Suspension Clause has no application to petitions for review that challenge factual and discretionary rulings by the agency, because it is well-established that the writ of habeas corpus historically extended only to legal and constitutional questions, not factual and discretionary questions. *INS* v. *St. Cyr*, 533 U.S. 289, 306-310 (2001); see, *e.g.*, 9 W.S. Holdsworth, *A History of English Law* 120 (1926). Accordingly, even assuming that habeas required a certain interlocutory remedy for the questions properly in its scope, it would require such a remedy only where there is a legal or constitutional error. Section 1252(f)(2) provides an effective remedy for such an error, for it permits courts to issue a stay when the alien is entitled to relief as a matter of law. 8 U.S.C. 1252(f)(2); see pp. 37-38, *supra*.

Moreover, in the ordinary case, an alien need not remain in the United States in order to pursue a legal or constitutional claim or benefit from a favorable judicial ruling. The court's review is based on the administrative record, see 8 U.S.C. 1252(b)(4)(A), and written legal briefs, 8 U.S.C. 1252(b)(3)(C), rather than in-person testimony. By policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, *inter alia*, facilitating the aliens' return to the United States by parole under 8 U.S.C. 1182(d)(5) if necessary, and according them the status they had at the time of removal. Amici hypothesize instances in which aliens could be harmed in their home countries while awaiting judicial review, but application of the Section 1252(f)(2) standard readily accommodates stays in those extraordinary cases. If an alien can demonstrate that it is more likely than not that he actually will be persecuted or tortured if removed to his home country, he is entitled to relief under the INA's withholding of removal provision, 8 U.S.C. 1231(b)(3), and the CAT, and would satisfy the standard for a stay. Amici therefore have identified no constitutional concerns with giving effect to Section 1252(f)(2), much less the sort of "grave and doubtful" concerns, *Jones* v. *United States*, 526 U.S. 227, 239 (1999) (internal quotation marks omitted), that are required before invoking the canon of constitutional avoidance.

3. This also is not an appropriate case in which to resort to the proposition that ambiguities should be construed in favor of the alien. In *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948), the Court resolved an ambiguity in favor of the alien, observing that forfeiture of his residence for acts committed after his admission was a "penalty." See *INS* v. *Errico*, 385 U.S. 214, 225 (1966); *Costello* v. *INS*, 376 U.S. 120, 128 (1964). The "penalty" theory is in significant tension with this Court's repeated acknowledgment that "[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry." *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

Moreover, such a rule cannot be justified in the immigration context by constitutional concerns such as fair notice, non-retroactivity of criminal statutes, and separation of powers, because aliens in immigration proceedings lack many of the procedural protections afforded in the criminal context. Compare *United States* v. *Bass*, 404 U.S. 336, 347-348 (1971), with *Lopez-Mendoza*, 468 U.S. at 1038. To the extent that the rule has vitality, it should be applied only to persons lawfully present in the United States. See, *e.g.*, *INS* v. *Phinpathya*, 464 U.S. 183, 194 (1984) (distinguishing between "a *lawful* resident alien" and "an *unlawful* alien," because the latter "has no basis for expecting the Government to permit her to remain in the United States").[10]

In any event, a court may properly consider whether any remaining ambiguities should be resolved in favor of the alien only *after* the court had used every interpretative tool at its disposal. *E.g.*, *Ruiz-Almanzar* v. *Ridge*,

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[10] Although this Court recently cited the principle in a case involving an alien who was in the United States illegally, it did not discuss the principle in any detail. *Dada*, 128 S. Ct. at 2318.

485 F.3d 193, 198 (2d Cir. 2007). There is no need to resort to application of lenity in this case, because Congress has made it clear that it does not wish to give the benefit of the doubt to aliens who enter or remain in the United States illegally. IIRIRA was enacted to make the prompt removal of aliens the norm, rather than the exception, see pp. 34-36, *supra*, and it was properly within Congress's "firmly established" "plenary * * * power to make policies and rules for exclusion of aliens," *Kleindienst* v. *Mandel*, 408 U.S. 753, 769-770 (1972). An abstract canon should not be employed to reject that judgment.

II. PETITIONER CANNOT IN ANY EVENT PREVAIL UNDER THE TRADITIONAL STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

Even if this Court were to decide that petitioner's stay motion should be evaluated using the four-part standard used for preliminary injunctive relief, rather than the Section 1252(f)(2) standard, it should affirm the court of appeals' order, because petitioner cannot prevail under that standard. At a minimum, this Court should reaffirm that the four-part standard requires a more demanding showing than petitioner suggests.

1. As an initial matter, this Court should reiterate that "[a] preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 129 S. Ct. at 376. Under the traditional four-part test for preliminary injunctive relief, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 374. At a minimum, even if the Court concludes that Section

1252(f)(2) does not provide the correct standard, that provision along with IIRIRA as a whole require strict adherence to the traditional four-part test.

Nonetheless, petitioner has suggested (Br. 3, 5) that a stay may be granted under this standard upon a showing of a mere "possibility" of relief. The en banc Ninth Circuit has agreed, holding that a stay should be granted if the alien demonstrates "either (1) a probability of success on the merits and the *possibility* of irreparable injury, or (2) that serious legal questions are raised and the balance of hardships tips sharply in the petitioner's favor." *Andreiu*, 253 F.3d at 483 (emphasis added; internal quotation marks omitted). That is incorrect: as this Court recently admonished, the "'possibility' standard is too lenient." *Winter*, 129 S. Ct. at 375. The preliminary injunction standard "requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction," and "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [this Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 375-376.

Some courts have also failed to apply a sufficiently stringent standard with respect to the merits showing required at the preliminary injunction stage. The Seventh Circuit, for example, has adopted a "sliding scale" approach "under which the more likely it is that the [alien] will succeed on the merits, the less the balance of irreparable harms need weigh toward [his] side" and "the less likely it is the [alien] will succeed, the more the balance need weigh toward [his] side." *Sofinet* v. *INS*, 188 F.3d 703, 707 (1999) (internal quotation marks omitted). Applying that standard, the Seventh Circuit has granted stays when an alien showed a "better than negligible chance of success on the merits." *Id.* at 708 (internal quotation marks omitted). That approach improperly weakens the standard for preliminary injunctive relief, which requires a *likelihood* of success on the merits, *Munaf*, 128 S. Ct. at 2219, not a *chance* of success.

Finally, with respect to the traditional public interest factor, this Court should emphasize that, in exercising their discretion whether to grant a preliminary injunction, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 129 S. Ct. at 376-377 (quoting *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982)); see also Pet. Stay Appl. 12-13 (ignoring public interest factor). Just as with respect to the national defense, Congress is due "great deference" in its determination that prompt removal of illegal aliens is in the public interest. *Winter*, 129 S. Ct. at 377 (internal quotation marks omitted); see *Mathews* v. *Diaz*, 426 U.S. 67, 82 (1976).

2. Applying the traditional four-factor standard, it is clear that petitioner cannot demonstrate that he is entitled to relief.

a. Petitioner cannot establish a likelihood of ultimate success on his challenge to the Board's denial of his third motion to reopen. Because petitioner's current motion to reopen was his third, and because it was filed more than 90 days after the entry of a final order of removal, petitioner was required to demonstrate changed country conditions using evidence that was "material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C.

1229a(c)(7)(C)(ii); 8 C.F.R. 1003.2(c)(3)(ii). Moreover, the denial of a motion to reopen on the ground "that the movant has not introduced previously unavailable, material evidence" is reviewable by courts only for "abuse of discretion." *INS* v. *Abudu*, 485 U.S. 94, 104-105, 110 (1988).

Petitioner is unlikely to establish that the Board abused its discretion in denying his third motion to reopen. The IJ did not deny petitioner's original application for asylum, withholding of removal, and protection under the CAT based on a conclusion about then-prevailing conditions in Cameroon. Instead, the IJ made "a specific adverse credibility finding," describing petitioner's testimony at the removal hearing as "incredible" and "improbable." J.A. 34-36; see *Huang* v. *Mukasey*, 534 F.3d 618, 622 (7th Cir. 2008) (upholding denial of motion to reopen by asylum petitioner previously found not to be credible who claimed changed country conditions), cert. denied, No. 08-490 (Dec. 8, 2008). The IJ also noted that certain documents—including a letter that petitioner claimed had been written by his brother—had not been properly authenticated and were otherwise suspect. J.A. 20-22. Those findings were expressly upheld by the Board, J.A. 45-47, and the court of appeals, J.A. 53, and they "remain[] undisturbed" in the current proceeding, J.A. 71.

As the Board correctly concluded, the evidence that petitioner submitted in connection with his current motion to reopen was not responsive to, and was thus not material in light of, the IJ's earlier adverse credibility finding. The Board imposed no per se requirement that an alien who seeks reopening of an asylum claim based on changed country conditions must invariably "submit a personal statement." Pet. Stay Appl. 11. Instead, it simply recognized that, because "the Immigration Judge's adverse credibility determination remains undisturbed," petitioner's failure to "submit his own statement" explaining how "recent reports of civil unrest in Cameroon" affected his particular claim "[wa]s significant." J.A. 71; see *Huang*, 534 F.3d at 622 (documents submitted to support motion to reopen by alien who had "been found to have lied" about his asylum claim "were not evidence that could be assumed to be uncontaminated by his demonstrated propensity to lie to obtain asylum").

Petitioner is mistaken in suggesting that the Board "ignor[ed] material evidence" (Pet. Stay Appl. 9) by not adequately discussing the letter allegedly from his brother. The Board specifically identified that letter as one piece of evidence petitioner had submitted. J.A. 71. Especially in the context of successive motions to reopen, the Board is not required to address separately each piece of evidence submitted. See, *e.g.*, *Casalena* v. *United States INS*, 984 F.2d 105, 107 (4th Cir. 1993). And, even now, petitioner does not explain how that later-written, third-party letter could "rebut the adverse credibility finding that provided the basis for the IJ's denial of [his] underlying asylum application." *Kaur* v. *BIA*, 413 F.3d 232, 234 (2d Cir. 2005) (per curiam).

b. Nor can petitioner demonstrate that he satisfies the remaining requirements for obtaining a stay under the preliminary injunction standard.

Petitioner has not demonstrated irreparable injury. He asserts that a stay is warranted because he "may face arrest, torture, and death upon his removal to Cameroon." Pet. Stay Appl. 2; see *id.* at 12. But he must establish a likelihood, not merely a possibility, of irreparable harm. See p. 47, *supra*. Moreover, petitioner's previous assertions concerning the likelihood of persecution were expressly rejected by the IJ, the BIA, and the court of appeals when petitioner first made them, based on the finding that petitioner's entire account was simply not credible. Especially because petitioner's claims about what will happen to him in Cameroon are premised on his assertions and on documents the agency has already deemed not credible, petitioner has not established a likelihood of irreparable injury.

Petitioner contends that the equities favor a stay because his removal would "leave behind his U.S. citizen wife and U.S. citizen young son." Pet. Stay Appl. 2; see *id.* at 12, 13. At the time of his 2004 marriage, however, petitioner had remained in the United States unlawfully for more than three years and had been ordered removed by the IJ. At the time his son was born in 2007, petitioner had remained in the United States unlawfully for nearly six years and was subject to a final order of removal. The fact that petitioner has now delayed his departure for almost eight years cannot itself furnish equitable reasons for permitting his unauthorized presence to continue even longer. Cf. *INS* v. *Rios-Pineda*, 471 U.S. 444, 450 (1985) ("The purpose of an appeal is to correct legal errors which occurred at the initial determination of deportability; it is not to permit an indefinite stalling of physical departure in the hope of eventually satisfying legal prerequisites.").

Significantly, petitioner also fails to address the other side of the balancing equation—the harm to the government and the public interest that would occur if a stay were granted. Petitioner has been found removable by the Executive Branch agency charged by Congress with making that determination, and that determination was upheld by a federal court of appeals in proceedings that became final well over a year ago. Petitioner's two previous attempts to reopen his long-concluded removal proceedings were rejected by the Board and the court of appeals. The Board has rejected this one as well, and the court before which petitioner's latest challenge is currently pending has denied his request for a stay of the underlying removal order. The government has been involved in litigation regarding petitioner's status for more than six-and-a-half years, and it wishes to execute the order of removal as soon as the necessary steps have been taken. See *Kenyeres* v. *Ashcroft*, 538 U.S. 1301, 1305 (2003) (Kennedy, J., in chambers). The government's interests are also harmed by petitioner's continued presence in the United States insofar as the government must bear the costs of detaining him (or, if he were released, of monitoring his whereabouts). Finally, the public interest would be harmed by permitting petitioner to remain in the United States, because "the consequence of delay * * * in deportation proceedings * * * is to permit and prolong a continuing violation of United States law." *AAADC*, 525 U.S. at 490.

Accordingly, even under the traditional four-part test, a stay of removal is not warranted.

CONCLUSION

The order of the court of appeals denying petitioner's motion to prevent his removal should be affirmed.

Respectfully submitted.

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JANUARY 2009

APPENDIX

1. 8 U.S.C. 1252 provides:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to section 1252(b)(4)(B) of this title, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of Title 28, United States Code.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

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[1] See Reference in Text note below.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been

presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1) of this section.

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

2. 8 U.S.C. 1105a (1994) provided, in pertinent part:

Judicial review of orders of deportation and exclusion

(a) Exclusiveness of procedure

* * * * *

(3) Respondent; service of petition; stay of deportation

the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs or unless the alien is convicted of an aggravated felony (including an alien described in section 1252a of this title), in which case the Service shall not stay the deportation of the alien pending determination of the petition of the court unless the court otherwise directs;

* * * * *

(c) Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceedings took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

* * * * *